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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 378

SUSIE MATY, ADMINISTRATRIX OF THE ESTATE OF GEORGE MATY, ALSO KNOWN AS GEORGE MATEY, PETITIONER,

vs.

GRASSELLI CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

George Maty, Also Known as George Matey, Plaintiff,

vs.

The Grasselli Chemical Co., a Corporation of Delaware, Duly Authorized to Transact Business in the State of New Jersey, Defendant

Statement of Evidence

Deposition of George Maty

Transcript of stenographer's notes of the deposition of George Maty, taken at his home, 3022 South Wood Avenue, Linden, New Jersey, before Kenneth C. Hand, Esquire, a Supreme Court Commissioner of New Jersey, at one thirty o'clock p. m. May 15, 1936.

Appearances:

Mario Turtur, Esq., for the plaintiff.

Messrs. Katzenbach, Gildea & Rudner, by Louis Rudner, Esq., for the defendant.

[fol. 2] (The Stenographer, John Jacobson, Official Stenographer, Union County Court of Common Pleas, Elizabeth, New Jersey, was duly sworn.)

(John Isky, 3024 South Wood Avenue, Linden, New Jersey, was duly sworn as Slavish interpreter.)

The Commissioner: It is stipulated between the respective counsel that the deposition being taken at the home of George Maty, 3022 South Wood Avenue, Linden, New Jersey, the plaintiff in the above entitled cause, is done by consent of both parties in the presence of Kenneth C. Hand, a Supreme Court Commissioner of the State of New Jersey, who is present by stipulation of the respective counsel.

It is further stipulated that the deposition be taken stenographically and the signatures waived.

The objections to counsel's questions will be noted by the respective counsel and passed upon by the Court at the [fol. 3] trial of the cause.

Mr. Turtur: I object to the presence of Mr. High here.

Mr. Rudner: Mr. High is Assistant Superintendent of the Grasselli Chemical Company and is here to assist me in the examination of the plaintiff.

The Commissioner: This question falls in the same category as that of the admission or rejection of evidence and shall be noted on the record for consideration by the Court at the trial.

Mr. Turtur: It is admitted by the attorney for the defendant that Mr. High has been the assistant superintendent of the Grasselli Chemical Company plant for the past fifteen years.

It is noted for the record that the examination of George Maty by the respective counsel is being made while he is lying in bed at his home.

[fol. 4] George Maty, the plaintiff, being first duly sworn according to law, on his oath, deposes and says:

Direct examination.

By Mr. Turtur:

(The following examination was conducted in the English language:)

Q. What is your name?

A. George Maty.

Q. Where do you live?

A. In Linden, 3022 Wood Avenue.

Q. You mean South Wood Avenue?

A. South Wood Avenue.

Q. How old are you?

A. Forty-seven.

Q. How long have you been in this country?

A. Twenty-two, twenty-three years.

Q. Where did you come from?

A. From Czechoslovakia.

Q. Where did you work before 1928?

A. Perth Amboy Raritan Company Copper Works I was working.

Q. How many years did you work there?

A. About seventeen; of course, I don't work straight.

Q. You did not work straight?

A. No, in the war time I was on the other side.

Q. Were you a soldier in the army?

A. Yes.

Q. In what army?

A. The Austrian army.

Q. How many years were you in the war?

A. Five.

[fol. 5] Q. Were you wounded?

A. No.

Q. Were you gassed?

A. There was no gas.

Q. When you came out of the war, what was the condition of your health?

A. Pretty good like.

Mr. Turtur: Let the interpreter ask him that.

Mr. Rudner: I think he is going pretty well, and that we should continue without the interpreter.

By Mr. Turtur:

Q. What did you mean by that?

A. I was good feeling and everything.

Q. What did you mean when you said before "pretty good like, I was good feeling and everything"?

A. Like good strong good man, first class.

Q. First class?

A. Yes.

Q. Did you ever suffer from any sickness or diseases at any time in your life before 1928?

A. I don't remember in my life I was sick; maybe when I was a baby, that's all.

Q. Since you came to this country, except the time when you were in the army, did you work steadily?

A. When I come here?

Q. Yes.

A. Sure.

[fol. 6] Q. You worked every day?

A. Every day.

Q. Did you ever suffer from any ill effects of any kind?

Mr. Turtur: I will withdraw the question.

By Mr. Turtur:

Q. What was the condition of your health before 1928?

A. I was pretty good, everything was good.

Q. When did you start to work for the Grasselli Chemical Company?

A. 1928.

Q. 1928?

A. 1928, in October.

Q. And you came from what company?

A. I come from the old country; I was on vacation.

Q. You were on vacation before 1928?

A. In 1928 I was away in July and in October I come back, and I come over in Grasselli.

Q. Where did you go to work for the Grasselli Chemical Company in 1928? In what department?

A. The silicate department.

Q. In the silicate department, what other departments are there?

A. Other different departments, phosphate and gun cotton and sulphuric; I don't know how many departments they have.

Q. In that building where were you working?

A. That is only the silicate department; that is all we call it.

[fol. 7] Q. You called that the silicate department?

A. Yes.

Q. In that silicate department are there any furnaces or were there any furnaces?

A. There is two old furnaces when I start to work.

Q. Did the furnaces have a number?

A. Number one and number two.

Q. Where did you start to work as soon as you went in there?

A. I start to work as a helper.

A. You started to work as a helper?

A. A furnace helper for two weeks.

Q. After you were a helper for two weeks, then what did you do?

A. They put me for a furnace man.

Q. At what number furnace did you work?

A. Both.

Q. You mean number one and number two?

A. Number one and number two.

Q. Are these furnaces on a level with the floor or are they higher than the floor?

A. They are higher than the floor.

Q. Did you use steps to get to the furnaces?

A. Sure.

Q. About how many steps did you use?

A. Well, one side is a little bit higher, about twelve, and the other one is eight, I guess eight or ten.

Q. At these furnaces where you worked, what were your duties? What kind of work did you do around these fur-[fol. 8]naces?

A. Well, I put the fire on and change the dampers and feed them with soda ash and sand and melt them.

Q. You would feed them with soda ash and sand?

A. Yes.

Q. Then what did you do?

A. I melt that and it comes like water.

Q. You melted what?

A. Soda ash and sand.

Q. And then it comes out like water?

A. Yes, and then I went on the other side and let it go out in a big drum in the water and from the water it goes into the cars and makes glass.

Q. What else did you have to do besides being this furnace man? Give me all of your duties.

A. Well, when I was working on those two furnaces I had a helper on the other side, and I didn't do on the other side nothing, just feed them and let them go out and feed them again and mix them and charge them, and that's all I have to do and change the fire from one to the other one and the dampers.

Q. Was there a platform over and above the first platform that you spoke about?

A. There was one platform right on the side of the furnace, and another platform we have on top, right on top of the furnace what we cleaned the flues and gas producers when we was working.

[fol. 9] Q. Did you have to clean those gas producers?

A. Yes, sure.

Q. How often?

A. Sometimes two times a week and sometimes three times a week.

Q. When you were working around these furnaces, was it cold or warm or very hot around them?

A. It is very hot in the summer, and in the winter it is the same.

Q. Did you perspire any? Did you sweat?

A. Sure, sweat when you work around.

Q. Did you sweat a lot or did you sweat a little?

A. In the summer a lot, and in the winter a little.

Q. Did you sweat both winter and summer?

A. Yes.

Q. Except that in the summer you perspired more?

A. Sure, in the summer you take every five minutes your shirt gets like water.

Q. Besides being the furnace man and cleaning these furnaces two or three times a week, did you do anything else?

A. No, just on the furnace and clean the flues, that was my job.

Q. During the time that you were working from 1928 on, what was the condition of the factory? Were there any chemicals flying around?

[fol. 10] Mr. Rudner: I object to that as leading. I think counsel should ask the witness what he saw without suggesting.

Mr. Turtur: I will withdraw the question.

By Mr. Turtur:

Q. What were your working conditions around the factory, around that plant where you were working? Was it clear? What was the atmosphere, if you understand?

By the Commissioner:

Q. Do you understand the question?

A. I can't understand it.

By Mr. Turtur:

Q. What was the condition of the air in the factory?

A. It was dust all the time.

Q. What kind of dust?

A. Soda ash.

Q. What was the product that you were making at these furnaces? What was the chemical that you were making at these furnaces?

A. I was making silicate, glass or silicate.

Q. You say it was dusty?

A. Yes.

Q. Was there a little dust or a lot of dust?

A. A lot of dust.

Q. Will you describe it and tell us what you mean by a lot of dust?

A. Because the tunnel upstairs what they carry soda ash for me, it is all holes.

[fol. 11] Q. The tunnel over and above the furnace where you were working was all holes?

A. And the chutes is holes, and when the soda ash stops in the chute, we have to hit that chute and that soda is dropped down and fall in every hole, and you have to run away outside.

Q. The soda ash dropped down? Would it drop down where you were working?

A. Sure.

Q. Would that make a little dust or a lot of dust?

A. That makes a lot of dust because when it is dropped down it is fall like water, one wheelbarrow or two fills up.

Q. From these holes?

A. From these holes, yes.

Q. Is that where you were working?

A. Sure.

Q. When this one wheelbarrow or two wheelbarrows of dust would come down, is this soda ash that you are talking about that was coming down on you?

A. Soda ash and sand.

Q. Was there anything in the factory by way of a fan or exhaust or anything to take out that dust?

A. There was nothing at all; there is no fan, there is nothing, just the factory with all holes, that's all.

Q. Were there any windows around the plant?

A. There was only two windows, three windows on my side, and we open it, but that dust comes back and it slides [fol. 12] like that.

Q. When the windows were open, the dust comes back to where you were working?

A. Sure, the wind turn it like this (indicating).

Q. How many hours a day did you work in that soda ash department?

A. Eight hours.

Q. And during the eight hours was this dust present all the time?

A. Sure, that is the same thing.

Q. All day long?

A. All day long, all day and night when they work, all the day there is dust there.

Q. Did the company give you anything to put to your mouth so as not to breathe in this dust?

A. No.

Q. Did they give you anything, or did they say anything to you about being careful about yourself?

A. No.

Q. Did anybody tell you that this dust was bad for you?

A. No.

Q. Are you sure of that?

A. Sure.

Q. From 1928 on how many months or years did you work there before anything happened to you?

A. Over two years.

Q. Over two years?

A. Yes.

Q. Before we come to that, were there fan belts around near where you were working around furnace number one and two?

[fol. 13] A. There was no fan.

Q. I mean these belts.

A. Sure, we have a lot of belts, pulleys and belts.

Q. Pulleys and belts?

A. Yes.

Q. Were these pulleys and belts wide or narrow?

A. All kinds, wide like this and like this, all kinds, wide (indicating).

Q. Was there a hole in the wall from where these pulleys were coming?

A. From the mixing room there was holes.

Q. How many holes were through the wall from where these pulleys were working?

A. Four pulleys.

Q. When these belts would go around, would that be the whole eight hours a day?

A. Sure, those belts work all the time.

Q. When these belts go around and work all the time, did that throw off any chemical of any kind?

A. That is soda ash, all dust all the time.

Q. Would that throw any soda ash on you towards where you were working?

A. Sure.

Q. Did you ever complain about that condition to anybody?

A. What do you mean?

Q. Did you ever complain about the condition of the holes in the conveyors that threw this chemical on you and [fol. 14] this dust coming off the pulleys that would be thrown towards where you were working?

A. I can't understand that.

(The question was repeated by the interpreter in Slavish.)

The Witness: I can't understand that.

(In English.)

By Mr. Turtur:

Q. I mean did you tell anybody?

A. I told the foreman.

Q. What was the foreman's name?

A. Mike Benkovitch.

Q. Did you tell anybody else?

A. The boss knows it, but I didn't tell the boss; I told only the foreman, and the foreman told the boss.

Mr. Rudner: I move that that be stricken out as to what the foreman told him.

Mr. Turtur: I insist that the question be answered on the ground that the foreman is a boss within the meaning of the cases, and that he is not a working man.

Mr. Rudner: The witness has stated that "I told the foreman", and I ask that everything beyond that be [fol. 15] stricken out on the ground that it is hearsay, that it is not proper to inquire or to have this witness state what the foreman may or may not have told someone else.

By Mr. Turtur:

Q. Did you see anybody else besides Mr. Mike Benkovitch? Do you remember Mr. Davis?

A. (The witness shook his head.)

Mr. Rudner: His answer was that he shook his head as no.

The Witness: Us three boys comes one morning, and we tell Mr. Davis that these pulleys make a lot of dust, and we have three or four inches every morning on this side of the wall. He say he cover up those pulleys, and he did; he cover up and he put boxes on them but anyway there was dust coming out.

By Mr. Turtur:

A. Were there any doors or openings between the mixing room and the room where you were working?

A. There was a door opening when the man was working shifting glass from here to stock or from stock to water, [fol. 16] these doors have to be open all the time.

Q. Those doors were open all the time?

A. And the mixer.

Q. From the mixing room was there any wind or draft that came in from there?

A. Sure, all soda ash so you could not see it sometimes.

Q. It was so heavy that you could not see it sometimes?

A. Yes, sure.

Q. From 1928 to 1930 did they start to manufacture any other kind of a chemical within the department where you were working, or if I am wrong about the dates, will you tell me as to years?

A. We was working on old furnaces to 1930.

Q. By the old furnaces, you mean what number furnaces?

A. Number one and number two. In 1930 in March we started to work on the new furnace.

Q. What was the number of the new furnace?

A. Number three.

Q. Was that near or far away from furnaces numbers one and two?

A. About fifteen or twenty feet, not more.

Q. Was furnace number three also on a platform?

A. That was higher than those furnaces.

Q. That was higher yet?

A. Yes.

Q. Was it nearer to the ceiling of the factory, near the [fol. 17] roof of the factory?

A. Sure.

Q. When you started to work in furnace number three in 19 hundred and what?

A. 1930.

Q. Was there any other chemical started to be manufactured in that department?

A. Not yet, just soda ash just the same.

Q. When you went to work there at furnace number three, what was the condition as to the air where you were working?

A. It was dust just the same, sometimes more than number one and two.

Q. It was sometimes more than from furnaces numbers one and two?

A. Yes.

Q. Did that dust fall downward upon you or did it go out?

A. It fall down from the tunnel and chute and holes.

Q. Referring to the tunnel and the chute that you talk about, is that the conveyor over and above the furnaces?

A. Yes, the conveyors and the chute.

Q. You said that there were holes in there?

Mr. Rudner: I object to any testimony with respect to holes. It goes beyond the scope of the pleading. There is no suggestion in the complaint or in the bill of particulars furnished with regard to any defective appliances or any [fol. 18] holes or defects of any kind.

Mr. Turtur: In the complaint I said that there were defective appliances, and that is part of the pleading, and further than that, paragraph number five of the complaint states that the negligence of the defendant consisted in this: (a) in failing to provide the plaintiff with a safe place to work; (b) in failing to provide the plaintiff with adequate or sufficient protection or appliances or safeguards in the said work; (c) in failing to provide a proper ventilating system in the plant.

Do you still make the objection?

Mr. Rudner: Yes, I certainly object.

Mr. Turtur: Answer number three of the bill of particulars is as follows:

"Plaintiff was exposed and forced to inhale and breathe the said metallic mineral, gas and or other injurious substances as mentioned in number one during his employment [fol. 19] while performing the operations in conformity to his duties."

Mr. Rudner: I press my objection on the ground that any questions having as their object to show any defects are not within the scope of the pleading or the bill of particulars.

By Mr. Turtur:

Q. Were there any holes in the conveyor over furnace number three?

A. It was in the chute and under the bottom.

Q. Did the dust fall on you just the same?

A. Yes, fall down and make all over smoke.

Q. What kind of dust was this?

A. Soda ash and sand.

Q. Did they give you any respirator to work with in furnace number three?

A. No, they just come over and they said "It is no good", and they fix that.

Mr. Rudner: I object to that on the ground that it does not say specifically who said that.

By Mr. Turtur:

Q. Who fixed that?

A. The man fixed that; I don't know who it was.

Q. Who came over and looked at it and said, "It is no [fol. 20] good" and had it fixed?

A. Mr. Davis.

Q. What was Mr. Davis's job and what was his position?

A. He had four plants under him; he was like a superintendent.

Q. He was like a superintendent?

A. Yes.

Q. He was higher than a foreman?

A. Sure, higher than the boss.

Q. And he had four departments under him?

A. Yes.

Q. Was he also the boss of the department where you were working?

A. Yes.

Q. Did Mr. Davis or anybody of the company come over and tell you that this dust, this chemical dust of soda ash and sand, was bad for you or tell you to be careful in any way?

A. No.

Q. Did you at any time know that this dust, the chemical dust, was bad for you?

A. No.

Q. In 1930 you were sent over to work in furnace number three, is that so?

A. Sure.

Q. And you say that the condition of the chemical dust was the same?

A. The same.

Q. And you said it was sometimes worse over there?

A. Yes.

Q. Were there any windows around furnace number three?

A. A lot of windows.

[fol. 21] Q. Were they open or closed while you were working there?

A. Closed, no open.

Q. How many windows were open? Were they all open or just some?

A. Just some because some we could not reach to open.

Q. How many windows would you say were open around furnace number three? Were they near the furnace or far away from the furnace?

A. Only two windows, so we can open those.

Q. Were they near the furnace or far away from the furnace?

A. About fifteen feet.

Q. When those windows were open, would that take out the dust?

A. It only turn around in there (indicating).

Mr. Turtur: The witness indicates a whirling condition.

By Mr. Turtur:

Q. Referring to this whirling condition that you just indicated, was that around near where you were working?

A. Sure, it was high there, and it turned around and come from the bottom sometimes when it falls from the chute, and on the chutes was no hammer.

Q. There were no hammers on the chutes at that time?

A. No, not when we start.

[fol. 22] Q. The chutes that you speak of are the chutes that go into the furnace?

A. It goes in the feeders.

Q. Were the hammers put on these chutes?

A. About half a year when I start working. That will take maybe around September or October, 1931, they put the hammers on.

Q. Before they put the hammers on in September and October, 1931, did anybody have to hit those chutes with the hammer?

A. We have to hit that with a hammer.

Q. And every time that you hit that with the hammer, what would happen, if anything?

A. It drops down, and the feeders are wider like the chutes, and that soda ash falls over me and then falls on the floor and from the floor it goes way down the bottom of the floor and comes up again all over, everybody has to run away. A lot of times those high men in there, the superintendent, I don't know what his name is, he used to run away from there, too. When it falls everybody has to run away, but I could not, because sometimes right that minute I change the fire, and I have to shut the fire on one side and go on the other side, and I have to stay there.

Q. You have to stay there?

A. Sure, I could not leave.

Q. Were there any fans or exhausts of any kind to take [fol. 23] out these chemical fumes?

A. No.

Q. And this dust?

A. No.

Q. Just the windows?

A. Just the windows.

Q. How were you up to 1930 when you started to work on furnace number three? I mean how did you feel? Were you all right or were you sick?

A. Well, I feel a little bit sweet in my mouth, but everybody says that everybody there is like that.

Mr. Rudner: I object to any statement made by anybody else, and I move that it be stricken out.

Mr. Turtur: I consent to that.

By Mr. Turtur:

Q. George, you must not tell us what anybody else said. How did you feel? All right?

A. I feel all right.

Q. You felt all right?

A. Yes.

Q. What date was that? What year?

A. 1930.

Q. After 1930 was there anything else that was being mixed or being made as to chemicals?

A. No, just that. In 1931 we make——

Q. In 1931?

A. In 1931, I don't know what month, March or January, I don't know what month, they started to make metasilicate, a laundry powder.

Q. They started to make metasilicate?

A. Yes.

[fol. 24] Q. Where was this chemical started to be made with reference to where you were working? Was it near you or around you?

A. No, it was further from me, but I have to work all over, look at my tanks for water and look at my settlers, and that place where they make metasilicate, they put over you a draft all the time and gets in my way when I go up to number three furnace upstairs because there was a hole that some comes out.

Q. From the time they started to make metasilicate in 1931, was the condition as to the chemical dust any better or any worse where you were working?

A. It was worse because with metasilicate I was sweating all the time.

Q. You were sweating all the time?

A. All the time on the furnace, and it itched me.

Q. It gave you the itch?

A. Yes.

Q. Did you know what gave you the itch?

A. I don't know.

Q. You did not know?

A. No.

Q. When they were making this metasilicate, you said that there was a draft. From where was this draft coming?

A. From that place where they make the silicate.

[fol. 25] Q. When they made this silicate, would there be a lot of silicate dust around you or just a little bit?

A. A lot of dust, a lot of dust.

Q. What was the color of that silicate?

A. It comes white, and it looked like yellow.

Q. Sometimes it looks like yellow?

A. Yes.

Q. When this silicate would come around where you were working, would there be just a little bit or a whole lot?

A. If you don't sweep one day, then the next day there is a whole lot.

Q. When they were making this silicate wasn't there a lot of this silicate where you were working? I mean as to the condition?

A. Sure, everything goes out there, and all the dust comes on my place.

Q. It comes over to your place?

A. Sure.

Q. Did you complain about that dust and about that draft to anybody?

A. I complained that to Mr. Davis and to Mr. Mike Benkovitch, but after my carbuncle.

Q. In 1931, when they started to make this metasilicate, you say you complained to Mr. Davis and to Mr. Mike Benkovitch?

A. Yes.

Q. Did they tell you then anything about being careful about the silicate?

Mr. Rudner: I object to what somebody told him.

[fol. 26] By Mr. Turtur:

Q. Did they say anything to you about this silicate?

A. They only told me—I said to Mr. Davis, "That is no good". He says, "Why?" I said, "Look how many smokes all the time, and it makes dust all the time, and it is no good." He says, "All right, George, we going to put fans up there soon, and we going to put a door." That is all he told me.

Q. When did he tell you that that was going to be done?

A. He don't tell me, he said soon.

Q. Was it done?

A. No, sir.

Q. Now, George, when did you start feeling this itch?

A. The Itch? 1932.

Q. Was it the beginning of 1932 or the latter part of 1932? Do you know what I mean?

A. I make a mistake.

Q. What is the mistake?

A. 1931 I got it; it started to itch me, and the last June or October was hot time, and that time it started to itch. That is the time it itched.

Q. In 1931?

A. Sure.

Q. What happened to you the first thing?
[fol. 27] A. The first thing?
Q. Yes.
A. In 1931, in April, I had a little pimple that anybody have same place over here behind my neck, and that powder, when you sweat and work over there, and that powder runs over all the time, and the soda ash itches my neck, and that started to be bigger and bigger and bigger like that (indicating).
Q. You are indicating a large lump in the back of the neck?
A. Yes.
Q. Is that right?
A. Yes.
Q. Then what happened?
A. I could not do nothing; and I went to doctor.
Q. To what doctor?
A. Company doctor.
Q. Do you mean at the Grasselli Chemical plant?
A. Yes.
Q. Do you mean the doctor that worked in the plant?
A. The doctor what worked with us.
Q. What happened?
A. He give me a prescription. He says, "You go to the General Hospital down the clinic and get that loose."
Q. Did you go to the General clinic?
A. I went to the General Hospital, and when they see that, he says——.

Mr. Rudner: I object to anything that transpired at the hospital.

[fol. 28] By Mr. Turtur:

Q. You say you complained to the doctor, the plant doctor, and he gave you a prescription, and you went down to the General Hospital?
A. Yes.
Q. What did they do for you at the hospital?
A. They operate.

Mr. Rudner: I object on the ground that it is not within the compass of this witness to testify what was done there and that such testimony will have to be given by the doctor or physician who treated the patient.

Mr. Turtur: I respectfully submit that the man can tell what was done for him, if he knows.

By Mr. Turtur:

Q. Will you tell us what they did for you?

A. They make an operation.

Q. Was this operation after this plant doctor gave you the prescription to go down to the hospital?

A. I was there for seven weeks, and then it healed up a little bit. It get healed a little bit, and then I come home, and I was home five weeks.

Q. You were in the hospital for seven weeks.

A. Yes.

[fol. 29] Q. You were home altogether twelve weeks, is that right?

A. Yes.

Q. That is three months?

A. Yes.

Q. After the three months period, what year was that?

A. 31.

Q. The latter part of 1931?

A. Yes.

Q. Do you know what I mean by the latter part, the end of the year?

A. End of the year—no, it was in June or October like that, last June or first of October when I come from there.

Q. From June to October?

A. Yes, I was home.

Q. In October, 1931, did you go back to work?

A. I went down to the plant.

Q. Whom did you see?

A. I seen the doctor there.

Q. You mean the plant doctor?

A. The company doctor.

Q. Do you remember the doctor's name?

A. Doctor Ward, a skinny fellow.

Q. He was the doctor at the plant, is that right?

A. Yes.

Q. In October, 1931, you went down to see the doctor at the plant?

A. Yes.

Q. What happened?

A. Mr. High come over in the hospital and he says, "George, come on, I will give you job", and Mr. Davis give me a job outside, and I was throwing sand down and [fol. 30] soda ash from the cars.

Q. You were throwing soda ash and sand down from the cars?

A. From the cars, yes.

Q. Was that an outside job?

A. That was outside.

Q. How long did you work outside?

A. Three weeks, and after three weeks when that healed all good——

Q. What healed good?

A. My carbuncle.

Q. Where did you work then?

A. Then the boss says——

Q. Whose boss? Which one do you mean?

A. I think it was the boss, because they change all the time.

Q. Who was the boss then?

A. I guess Clarke was the boss, but Mr. Davis tell me where to go to work.

Q. But Mr. High had a talk with Mr. Davis?

A. Yes.

Q. In your presence?

A. Sure.

Q. And then you went over to work on these cars, throwing out the sand and the soda ash?

A. Yes.

Q. When you worked outside there was that clean or was that dusty, too?

A. In the sand cars, it is clean.

Q. In the sand cars it is clean?

A. Yes, and in the soda ash cars it was dusty, and we had those little rags, gas masks or what.

Q. Gas masks? Those little rags or gas masks, did you say?

A. It looks like gas mask, but they are rags.

[fol. 31] Q. They are made of rags?

A. Yes.

Q. Where did you put it?

A. When I throw the soda ash from the car, then I use that.

Q. You worked outside for three weeks then?
A. Yes.
Q. After the three weeks where did you go to work?
A. On Number three furnace.
Q. Doing what?
A. The same thing what I did before.
Q. What was the condition of the dust when you returned there?
A. Same thing.
Q. The dust would go out or come down on you?
A. It is flying and come down from the chute.
Q. On you?
A. Yes.
Q. Did they tell you there to be careful anymore?
A. No.

Mr. Turtur: I will withdraw the question.

By Mr. Turtur:

Q. Did they tell you to be careful at all?
A. No.
Q. Did they give you any respirator?
A. Nothing at all.
Q. They gave you nothing to protect yourself?
A. No.

The Commissioner: We will take a five minute recess at this time.

(A brief recess was had.)

[fol. 32] By Mr. Turtur:

Q. Did anybody tell you to be careful of that dust?
A. No.
Q. George, what was the process of manufacturing this silicate, if you know? Where would the silicate go and what would it go through?

(The interpreter repeated the question to the witness in Slavish).

The Witness: (in English): We put the sand in this thing and the soda ash in the box and let them out, and that makes the glass, and then we took that glass and put in under clay and water and make what kind of silicate they wanted, light or caustic, what kind of silicate they wanted.

They gave us the order, and in that way we mixed it, and then we make the order. That is called all kinds of silicate, number forty and C. & P., all kinds of silicate, we call it mixed.

By Mr. Turtur:

Q. What were these caustics that they put into it? What is the name of the caustic chemical that they put into it?

[fol. 33] A. That is caustic. We don't use all of it; just when they want us.

Q. When you were mixing this, was that dusty, too, around there?

A. There was no dust, just steam is hot, but in the factory it is all the time dusty when the factory was working.

Q. It is all the time dusty when the factory was working?

A. Yes.

Q. You worked outside for three weeks and then came and worked on furnace number three again, and the same condition was there as to this dust that you spoke about?

A. Yes.

Q. And it fell through the chute on you?

A. Yes.

Q. And this other dust came over from the silicate department on you?

A. The silicate came all the time because it is higher over there.

Q. Did that stuff go up or did it come down?

A. That stuff is flying. They have a draft, and they put a draft and it flies and goes out, and when it gets a little bit warm the metasilicate gets heavy and it falls down.

Q. It falls down toward where you were working?

A. All the way.

Q. How long did you work there before anything else happened to you?

A. I don't remember how many months.

[fol. 34] Q. Try to think. Don't be in a hurry with your answer, but think. When you came back the second time, do you remember you said you were out for twelve weeks?

A. Yes.

Q. Then you worked outside for three weeks until that carbuncle was pretty well healed, and they sent you back to work in the soda ash department where they made silicate and soda ash at furnace number three?

A. Yes.

Q. Is that so?

A. Yes.

Q. How long did you work there?

A. Maybe about five or six weeks, like that, I don't remember, five or six weeks.

Q. And then what happened?

A. It was smoking at that time.

Q. What do you mean smoking?

A. That dust all the time comes out.

Q. Why did you use the word smoke?

A. I only see the smoke because sometimes when it is foggy outside, everything stays in the shop, and you cannot see from one end to the other end; it is all smoke.

Q. The dust was so heavy that you could not see——

Mr. Rudner: I object to counsel interpreting what he says.

[fol. 35] By Mr. Turtur:

Q. Tell us what you mean by that.

A. Well, those times, the foggy days, the dust don't go out, so just everything is mixed in there, and it stays in there, and it falls right on the ground and on you where you are.

Q. What happened to you? You said you worked there for maybe five or six weeks and then what happened after that?

A. Well, it started to itch my hands.

Q. It started to itch your hands?

A. Hands and all over the face.

Q. Were you perspiring around that job, too?

A. Yes, and I told Mr. Davis again, "When are you going to do that?"

Q. Do what?

A. "When are you going to stop that powder so it don't go away here? I don't know what is the matter with my hands, something itch me and I have to scrape myself and everything, and my neck."

Q. You just indicated scratching, is that what you mean?

A. Yes, spots come out, and I have to scratch myself.

Q. What did he say?

A. He says, "Well, that's right, it has got to be finished."

Q. What has to be finished?

A. He going to put the door and exhaust fans to make it stop the hole so it would not be no dust nowhere. He [fol. 36] said, "I am going to stop the mixer room, too."

Q. What about the mixing room?

A. The soda ash come from mixing room all the time.

Q. Do you mean through these doors that were open?

A. Through these doors when they open, and if they shut it, anyway the dust comes out on the sides or in the holes where these boxes are on the pulleys.

Q. The dust came out from where the pulleys were?

A. Sure, because they can't put that box on sheet iron, because the sheet iron is one place lower and another place high, and they just put the boxes up there, and the dust comes out, and it flies all over.

Q. When was that? Do you remember what year?

A. That was 1931 when I come from the hospital.

Q. You said you were out until October, 1931?

A. Yes.

Q. Then you worked for three weeks?

A. Outside.

Q. And after the three weeks you came back again?

A. Yes, but I don't remember how many weeks, I guess five or six, maybe more or less.

Q. Within five or six weeks after October, 1931, you say you got this itch, and you had this other conversation with Mr. Davis?

A. Yes.

Q. And then when you got this itch, what else happened [fol. 37] to you, if anything?

A. I got sick; I got cough, cold, fever, and cold sweats, and I am sweating and cold.

Q. You are sweating and cold?

A. Yes, and then at night time, if I was working at any time, and when I was sleeping, I get fever, and I get it in my mouth, and I have to wash it out, and sometimes my wife——

Q. You are indicating what? Why did you wash your mouth?

A. It is sweet and sour, all kinds of taste in the mouth, and I was coughing.

Q. You were coughing?

A. Yes, a little bit I got all the time, and I think "What is the matter with me?" Sometimes I got no breath, I can't breathe.

Q. You are short of breath?

A. Yes.

Q. You could not breathe?

A. No.

Q. Was there anything else that you felt?

A. Sure, I lost weight.

Q. You started to lose weight?

A. Yes, I started to lose weight, and I lose my strength and I was weak and I get weaker all the time.

Q. That was during the time that you had this itch?

A. Yes.

Q. According to what you said, that would be about November or December, 1931?

A. Yes, I told once the doctor.

Q. What doctor?

A. Doctor Ward.

[fol. 38] Q. Is that the plant doctor?

A. The plant doctor. I told him everything about that, and Mrs. Ludwig, they look at it.

Q. Who is Mrs. Ludwig?

A. The nurse, and they says, "George, you are sick because you got that skin all over with the itch, and that is why you are sick. You look like you are just thinking you are sick." Well, I don't think so, because I can't eat, and I lose weight. Well, that is all there was on that, and I went back to work.

Q. Did you tell them of those other things that you felt? Did you tell the doctor?

A. I don't tell that doctor no more because he said I am just thinking about the sickness from that itch, and that is why I am like that.

Q. You felt all those things that you said before?

A. Yes, and I went back to work in 32.

Q. Where?

A. In the plant. They was treating me for seven or eight months, and they see they could not cure me.

Q. You had this itch for how long before you went back to work?

A. I had that itch for at least two or three years, two years, it never get clear.

Q. You said that you got this itch sometime in November [fol. 39] or December, 1931, and you started to cough?

A. Yes.

Q. And you said that you started to get short of breath and all these other things that you spoke about?

A. Yes.

Q. When you went back to Doctor Ward at the plant, and you told him these things, and he said that you just think about this because you got the itch, how long was that before you went back to work, if you can remember? Do you understand me?

(The interpreter repeated the question in Slavish.)

The Witness (in English): About seven weeks.

By Mr. Turtur:

Q. Then when did you go back to work?

A. After seven weeks I went to the doctor.

Q. What doctor?

A. To the company doctor.

Q. You mean to the same Doctor Ward at the plant?

A. Sure, and Mr. High comes over down the hospital and he says, "George, come on and work, we going to give you a job not over there." I says, "I can't, because I ain't got no skin around here yet (indicating)."

[fol. 40] Q. Around where?

A. Under my arms.

Q. What was the matter with you? What did you have under your arms?

A. There was no skin, just sore and thick swelling up, and the water was coming out.

Q. The water was coming out of your skin?

A. Yes, yellow water.

Q. Do you know what that was?

A. No.

Q. Did it smell good or bad?

A. It didn't smell.

Q. Did it smell no good?

A. No smell.

Q. Mr. High said to you, "Come on, George, you go to work?"

A. No.

Q. What did he say?

A. I says, "I can't." He says, "Well, come on in the bathroom and show me how it is." I went to the bathroom with the doctor and Mr. High, and I show them, and the doctor says to Mr. High, "Let him alone with the doctor until he gets a little bit skin yet, and then he come back to work."

Q. Then what did Mr. High do and what did he say?

A. Nothing.

Q. Did he leave you alone?

A. He leave me alone; I was home yet for a week.

Q. Do you remember what month that was in 1932? Did you get compensation then?

A. I got my own insurance first, and then Mr. High called [fol. 41] me up about my compensation, and I have to give him money to pay my own insurance.

Q. You say you got a proposition or compensation?

Mr. Rudner: I object to that sort of testimony as irrelevant, incompetent and immaterial with respect to the issues in this case. All we are interested in are the facts respecting this man's working conditions in the plant, and anything in regard to the question of compensation is incompetent, irrelevant and immaterial.

Mr. Turtur: I press the question on the ground that it shows a corroborating element that he received workmen's compensation under the Workmen's Compensation Act for this skin ailment, which will be proved by the records of the Department of Labor.

Mr. Rudner: I make a further objection that it is incompetent, irrelevant and immaterial and that it is a subject matter which was taken care of by the Compensation Laws [fol. 42] of the State of New Jersey, and it cannot be involved in this proceeding, which is at common law. In other words, if Mr. Maty had an ailment or injury which was compensable at that time by the Workmen's Compensation Act, it is not something which can be the subject matter of this case, which is predicated upon negligence under common law.

Mr. Turtur: I press the question on the further ground to show the condition of the plaintiff's skin at the time and to show that he did not work or could not work and to further show that by reason of the condition from which he was suffering, the conversation just referred to by Mr. Maty as between Mr. High, the Assistant Superintendent, and the plant physician, is very relevant and very material to this issue.

[fol. 43] By Mr. Turtur:

Q. After this conversation with Mr. High and the plant doctor, what did you do?

A. I was working half time because the itch was itching me.

Q. Where did you work when you worked only half time?

A. In the silicate department I was sweeping outside and I was picking up papers, and I was sweeping upstairs.

Q. When you were sweeping upstairs and in the silicate department, was there any dust there, too?

A. There is dust.

Q. Did they give you any respirator?

A. No.

Q. Did anybody tell you to be careful about that dust?

A. No.

Q. What kind of dust was that in the silicate department?

A. It is metasilicate.

Q. Anything else?

A. And soda ash.

Q. Did you breathe that in?

A. Sure, if you work there.

Q. You worked at that eight hours a day?

A. I was working that time ten hours a day.

Q. Do you remember when that was?

A. That was seven weeks after I got it.

Q. Just listen, George, and maybe I can help you. You said you went back to work about October, 1931? Do you remember saying that?

A. Yes.

[fol. 44] Q. Then you went back to work, you say, and you started to work outside, and then you came back to work after three weeks working outside, and you were put back on the furnace, and then you worked on the furnace for how long? Do you remember?

A. That's what I don't remember.

Q. You said at least five or six weeks?

A. Five or six weeks.

Q. That would be around November or December, 1931?

A. Yes.

Q. That is the time you said you got the itch?

A. Yes.

Q. And then you started to feel all those things which you said before, is that right?

A. Yes.

Q. You told that to the doctor, and the doctor told you that it is because you got the itch, that is why you think you are sick, is that right?

A. Yes.

Q. Does that make you remember about when that was as to the time of the year in 1932?

A. No.

Q. You don't remember the exact time of the year?

A. No, I don't remember exactly.

Q. As to that time?

A. No.

Q. How long were you out with this itch?

A. That's what I say, sometime I was working, and sometime I was not working, I could not tell you because [fol. 45] I ain't got the time on paper how many times I have to stay home and how many times I could go to work. They was treating me seven or eight months, and they see they could not treat me, and they put me on the skin specialist doctor.

Q. For seven or eight months they could not treat you at the plant?

A. Yes.

Q. So they put you under the skin specialist, is that right?

A. Yes.

Q. Who was this skin specialist? Do you know?

A. Oleynick, from Elizabeth.

Q. Doctor Oleynick treated you?

A. Yes.

Q. Do you remember when that was?

A. That was in the winter time.

Q. In the winter of what year?

A. I think it was in 1932.

Q. In the winter of 1932?

A. Yes.

Q. For how long did Doctor Oleynick treat you and for what?

A. He treat me for the skin and my itch, and that is nine weeks.

Q. How was your cough by this time, and how was your breathing, and your weight, and your appetite, and how was your sleep and your chills and fevers?

A. All the time worser, all the time it comes worser and [fol. 46] worser; I think it was from that itch.

Q. You thought it was from that itch?

A. Yes.

Q. Did you explain to the doctors about the cough and these other things?

A. To Mr. Oleynick? He says that is not his business; his business is only skin.

Q. Did you tell that to Doctor Ward?

A. Sure, I tell Doctor Ward before.

Q. What did he say or do?

A. I told him before, and that's what he said, that I am just thinking.

Q. You are just thinking?

A. Yes.

Q. You said that when you went to Doctor Oleynick all these things that you testified before were getting worse? Is that right?

A. Yes.

Q. How long did Doctor Oleynick treat you?

A. Nine weeks.

Q. And then after the nine weeks did you go back to work?

A. Yes, they sent me back to work, and they give me a job.

Q. Where? Whom did you speak to when you went back to work?

A. I speak to everybody and to the doctor and Mr. High.

Q. What doctor? Doctor Ward?

A. Yes.

Q. And also to Mr. High?

A. Yes.

Q. Mr. High is the assistant superintendent?

A. Yes, and Mr. Davis.

Q. Did you speak to Mr. High about your condition and how you felt?

[fol. 47] A. He asked me how is it, and I said I am all sick, that's all.

Q. Did you tell him all those things that you were feeling?

A. I don't tell him I am this and that and this. "I am just all sick, Mr. High."

Q. What did Mr. High do or say?

A. Nothing, he don't do nothing about that.

Q. And then you went back to work?

A. Sure.

Q. Where did you go back to work?

A. Back to the silicate. I was washing drums in there.

Q. You were washing what?

A. Drums, filling with silicate for a while.

Q. You filled the drums with silicate?

A. Yes, for a while.

Q. While you were filling the drums with silicate, was there any dust or gas there?

A. There is all over dust, dust, dust, dust.

Q. Did they tell you to be careful now?

A. No.

Q. Did they give you any respirator?

A. No.

Q. When was that?

A. 1932.

Q. You said it was in the winter of 1932, and then you laid off for eight or nine weeks?

A. Yes.

Q. Doctor Oleynick treated you then, and you went back and talked to Mr. High and Doctor Ward, and they put you [fol. 48] back to work in the silicate department filling these drums, is that right?

A. Yes, and then they changed me to another department.

Q. They changed you from the silicate department to what other department?

A. Phosphate of soda and gave me a job two days outside. I was dumping rocks.

Q. What kind of rocks?

A. Phosphate rocks, what they make phosphate soda from that.

Q. What else?

A. Three days I was inside.

Q. Where were you when you were inside?

A. I was inside on top of the tanks all the time; I was operator.

Q. On top of what tanks?

A. Liquid.

Q. When you say that, you mean liquid like water?

A. Yes.

Q. And when you were working on top of these tanks, was there any chemical dust there?

A. There is a lot of dust and phosphate.

Q. Were you told to be careful in that operation?

A. No.

Q. Were there any exhaust fans there then?

A. There is no exhaust fans.

Q. Was the condition as to the chemical dust the same?

A. The same thing.

Q. Did they give you a respirator then?

A. No.

[fol. 49] Q. How long did you work around this department where you were working sometimes outside and three days inside, I think you said?

A. Three days outside and two days inside.

Q. What did you do when you were inside?

A. Operator.

Q. What did you have to do as such operator?

A. Watch the pumps and pump the mud out and put on the dryer and dry them so that they make blocks with it.

Q. What room was that in?

A. That was the Dorr plant; they call it the Dorr plant.

Q. That was not in the same department as the soda ash or silicate, was it?

A. There is a lot of soda ash because they take the liquid from me right at the tanks on my side and throw the soda ash in there with the liquid, and that is what they make phosphate soda.

Q. How long did you work at that operation, three days outside and two days inside?

A. From 1932, I don't remember what month they changed, to 1933, until the last of November.

Q. You worked until the last of November in 1933?

A. Yes.

Q. In what department?

A. Phosphate soda.

Q. Was that the last time that you worked, in November, 1933?

[fol. 50] A. Yes.

Q. The latter part of November, the end of November?

A. Yes.

Q. When you were working in this phosphate soda department, where there was silicate and soda ash, what was the condition when you stopped working in November, 1933, as to dust and so forth?

A. All the time when I started work.

Q. What was the condition as to dust in this department where you were working in November, 1933?

A. It is all dust all the time the same.

Q. It was the same condition as existed all the time before?

A. The same when they work.

Q. What kind of dust was that? From what departments?

A. Soda ash dust, and they got three kind of stones in there, and they grind them stones, and that smoke comes up on the tanks where we was working.

Q. What department was that?

A. Phosphate soda; we call it the Dorr plant.

Q. Phosphate of soda, which you call the Dorr plant?

A. Yes.

Q. What kind of chemicals did they have in that plant?

A. We have sulphuric acid and phosphate of soda rocks.

Q. Where this sulphuric acid and phosphate of soda rock was, was there any silicate and soda ash there?

[fol. 51] A. Soda ash was on the side about fifty feet; it was no silicate there.

Q. There was no silicate there?

A. No.

Q. Was there soda ash there?

A. Soda ash.

Q. Referring to this sand that you used to make soda ash with, was that thin or heav*ing* sand?

A. No, it is rocks, it is like rock; it is yellow and black and all kinds.

Q. I am not talking about November, 1933, but I am talking of the time that you were working in the soda ash department, in the silicate department. Was that sand, that they make soda ash with, fine or heavy sand?

A. That is heavy glass sand.

Q. Heavy glass sand?

A. Yes, sand what they use for glass.

Q. Before November, 1933, was there a physical examination given to you by some other doctor than Doctor Ward from the plant?

A. (No answer.)

Q. Do you want a little rest?

A. No. They get a new doctor in 1933 from Pennsylvania some place and examination everybody in the plant. He called me up to the hospital and he said, "George, I am going to give you examination." "All right." That was about last October or first of November.

[fol. 52] Q. It was the last of October or the first of November of 1933?

A. 1933. The first thing he takes a big pump and he tried to take my blood, and he could not take no blood out. Then he let me in the room where the nurse is, I don't know what he got there, a box, and he come back and says, "Well, George, I am going to look you all over, something the matter with you." and he was looking me all over.

Mr. Rudner: I object to any conversation he had with the doctor.

Mr. Turtur: This is the doctor hired by the company for the purpose of giving him a physical examination and the statements that were made to him at the time of the examination.

Mr. Rudner: I object on the ground that the statement should be made by the physician himself. The witness cannot attempt to testify regarding the examination by the physician. The only person who can testify particularly to that fact is the physician himself.

[fol. 53] Mr. Turtur: I disagree with my learned adversary in that the physician was not one that was hired by us but was hired by the respondent company who was making a physical examination of the plaintiff, and any conversation between the plaintiff and the physician is admissible evidence on the ground that the physician was not our agent but rather the authorized agent of the defendant company.

Mr. Rudner: I further object on the ground that the question to be decided in this case is the alleged negligence with respect to the operation of the plant, and that it has no relation to any treatment given by any physician to Mr. Maty, and that any conversation or statement made by the physician would only go to the condition of health of Mr. Maty, and that can be testified to only by the physician himself.

[fol. 54] Mr. Turtur: This is not a question of treatment as given by the physician at the plant, but it goes to the question of what the physician did and what he said as the result of the examination.

Mr. Rudner: I still object further on the ground that it is not competent and that it is beyond the issues in this case, that it does not come within the scope of the case, and that this is not a matter which could be offered to this particular witness, and further, that it cannot be binding on the defendant company.

Mr. Turtur: I say that it is binding on the defendant company in that this was a physician not hired by us, but hired by the respondent company, and anything that he did or said is binding on the company as being within the purview of his authority as a physician.

By Mr. Turtur:

Q. What did he say and what did he do?

[fol. 55] Mr. Rudner: I want my objection as heretofore noted with respect to the previous question to carry over to the very question now propounded, "What did he say."

Mr. Turtur: The question now propounded is not intended to be another question than the one before to which counsel has already objected.

By Mr. Turtur:

Q. What did he do, and what did he say?

A. He was looking all over me and he put the fingers here (indicating), and he says to cough.

Q. You are now indicating the private region, the groin?

A. He says, "Cough, George," and he says, "George, you better watch out, you got two rings on your side. Is it sore?" I said, "I don't feel sore because my whole skin swelled with that itch, I don't feel it." He said, "You watch yourself, don't lift so much because you will get a hernia." Then he hit me in the back like that and he says, "You are all over all right, you look like a good man." I says, "Mr. Doctor, I ain't all right, I told you everything [fol. 56] about it. What is the matter with me?"

Q. What did you tell the doctor?

Mr. Rudner: I make the same objection to that question just propounded that I made before with respect to the previous question on the same grounds that I heretofore urged in my previous objection.

Mr. Turtur: I urge the same reason for propounding the question as heretofore made in the previous question for propounding the same.

By Mr. Turtur:

Q. Do you want a little rest?

A. No.

Q. What did you tell this doctor? Tell us everything.

A. I told the doctor I am sick, and he says, "What is the matter? You don't look like sick man." I says, "I got a cold and sweating in the night times, and I can't sleep because I got fever at night, and around my mouth something comes out bad, but I don't taste; I don't know how it tastes, sweet and sour, and all kinds of taste." He says, "What else?" I says, "Well, I lose some weight, I lose [fol. 57] my strength and getting weak because I can't eat. I ain't got no appetite." He just looked at me and says, "What else?" I says, "I told you I got fevers again, night fevers, and if I lay down in the bed, I start to get fevers and get cold and it shakes me up, and I got short breath."

Q. You got a shortness of your breath?

A. Yes, and over here it hurts me all the time (indicating). Sometimes it pains me over there (indicating).

Q. You are indicating the right side of the chest and the right side of the back in the upper region?

A. Yes, and neck. Then he says, "What else?" I says, "Well, the cough all the time getting worser and I am losing weight all the time and getting weaker, and sometimes, a lot of times, I get weaker, and a lot of times,—I don't know how to say it—it is coming cold and comes like pimples on me and shake me, but it is hot." He says, "All right, is that all?" I says, "No, not yet, something comes up and I sneeze all the time like that." He says, "Is that all?" I says, "Yes." He says, "You are crazy. What do you think, George, do you think you have some of that [fol. 58] chemical stuff in yourself?"

Q. The doctor said, "George, what do you think——"

Mr. Rudner: I object to that statement and to that question on the same ground heretofore urged with respect to the previous questions.

Mr. Turtur: I urge the same re-son for my question as now propounded as heretofore made wherein Mr. Rudner objects to the question.

By Mr. Turtur:

Q. The doctor said what?

A. The doctor said, "Do you think you have some of that chemical stuff in yourself?" I says, "I think maybe I have, maybe, I don't know, but I am sick, that's what I told you, and that is right, and you can see I am getting lower all the time." He says, "George, you are crazy. If you had some of that chemical stuff in you some place in your chest or some place else or in your stomach, you will be dead, you will die right away." That was all.

Q. Then you continued to work?

A. Then I went to work and continued by it.

[fol. 59] Q. You continued to have the itch?

A. Yes, but I could not walk with the itch around here (indicating), and I went to the doctor and show him.

Q. You are indicating where? You had the itch where?

A. In the middle of the legs and all over the balls, and I could not walk. Then I went to the doctor, and I says——

Mr. Rudner: I object.

The Witness (Continuing): To that new one, "I can't work no more, put me where you want, put me on the specialist again."

By Mr. Turtur:

Q. Before we come to that, before you could not work anymore, when this doctor said something about chemicals, did you take a sample of any of the chemicals?

A. Sure.

Q. When did you take the samples?

A. When I went back to work and I was working on the dump cars, and I was thinking——

Mr. Rudner: I object to that.

By Mr. Turtur:

Q. You took some chemical samples?

A. Samples, same that day.

Q. Did you take samples from every place where you worked?

A. No, I didn't take no samples from the phosphate be-
[fol. 60] cause I didn't get sick in the phosphate.

Q. You did not take any phosphate?

A. No.

Q. I show you some samples and ask you if those are the samples that you took?

A. Yes.

Q. Did you take this white powder in this package?

A. Sure, there is more.

Q. Wait a minute, please. Did you take this greenish rock formation?

A. Sure.

Q. It is in this brown bag?

A. Yes.

Q. Do you know what this is (indicating)?

A. That is glass, they make silicate from this.

Q. You make silicate from this?

A. That makes water.

Q. This white powder is what I showed you first?

A. I gave you two powders.

Q. What is this (indicating)?

A. This must be metasilicate.

Q. Did you take this (indicating)?

A. That is silicate from that glass.

Q. This is silicate from that glass as shown you in the second one?

A. Yes.

Q. Did you take this (indicating)?

A. That is silicate.

Q. From what department did you get this?

A. Silicate department from the barrel.

Mr. Turture: I offer this as number one in evidence.

[fol. 61] (The article referred to was received in evidence and marked "Plaintiff's Exhibit 1").

By Mr. Turtur:

Q. From what department did you get this (indicating)?

A. Silicate department from number three furnace upstairs where it falls from the conveyor. That was all warm yet when I took it.

Mr. Turtur: I offer that in evidence.

(The article referred to was received in evidence and marked "Plaintiff's Exhibit 2.")

By Mr. Turtur:

Q. What is this number two?

A. We call it glass.

Q. What is this (indicating)?

A. That is from soda ash, you make silicate from.

Q. That is silicate F. grade?

A. We make silicate from that.

Q. What is this (indicating)?

A. This is silicate, but I don't know what kind is the name.

Q. But this is silicate in this bottle?

A. Yes.

Q. That is the bottle with ~~the blue cap~~ on the top?

A. Yes.

[fol. 62] Q. From what department did you get this?

A. Silicate department on the side where they took samples from.

Mr. Turtur: I offer this in evidence.

(The article referred to was received in evidence and marked "Plaintiff's Exhibit 3".)

By Mr. Turtur:

Q. I show you another bottle marked "Silicate F Grade," and I ask you where you took this from.

A. I took this when I was going out of the silicate in the place where they fill the drums, and they take the samples all the time, and I see a lot of bottles over there, and I take this.

Mr. Turtur: I offer this in evidence.

(The article referred to was received in evidence and marked "Plaintiff's Exhibit 4".)

By Mr. Turtur:

Q. In what department did you get this (indicating)?

A. Silicate.

Q. I show you another bottle. Do you want a little rest now, George?

A. No.

Q. This bottle is marked, "Phosphate of Soda." Where [fol. 63] did you get that?

A. Phosphate department, yes, I didn't take no rocks from that phosphate.

Mr. Turtur: I offer this in evidence.

(The article referred to was received in evidence and marked "Plaintiff's Exhibit 5".)

By Mr. Turtur:

Q. From which department did you get this?
A. Phosphate soda department.
Q. I show you another bottle marked "Soda Ash". Where did you get that from?
A. I got it in the silicate.
Q. In the silicate department?
A. Yes.

Mr. Turtur: I offer that in evidence.

(The article referred to was received in evidence and marked "Plaintiff's Exhibit 6".)

By Mr. Turtur:

Q. Where did you get this from (indicating)? This is marked "Metasilicate, regular." Where did you get this from?
A. In the silicate department.

Mr. Turtur: I offer that in evidence.

(The article referred to was received in evidence and marked "Plaintiff's Exhibit 7".)

[fol. 64] By Mr. Turtur:

Q. Where did you take these samples from the factory? Where did you bring them to?
A. I bring them home.
Q. To your home?
A. Yes.
Q. Where did they remain?
A. What do you mean?
Q. Where did you put them at home?
A. I had them in the cellar.
Q. Until when did you keep them there?
A. I was keeping them the last time until I give to you.
Q. Until you gave them to me?
A. Yes.
Q. You gave them to me on October 4, 1935, is that right?
A. Yes.

Q. Is that when you gave me the rest of the samples that are marked in evidence?

A. All samples.

Q. Do you want a little rest, George?

A. No.

Q. You said you stopped working in November, the latter part of November, 1933, is that right?

A. Yes.

Q. How did you feel when you were working?

The Commissioner: We will take a recess at this time.

(A brief recess was had.)

By Mr. Turtur:

Q. George, I show you a picture and ask you if that represents you in that photograph. Is that you? [fol. 65]

A. Sure, that's me.

Q. When was that picture taken?

A. Christmas, 1928.

Q. Were you working for the Grasselli Chemical Company then?

A. I was working already.

Q. Who else is on that picture with you?

A. My wife.

Mr. Rudner: I object to that as highly improper.

Mr. Turtur: I offer the picture in evidence.

Mr. Rudner: I object to it on the ground that it contains persons other than the plaintiff. It contains persons whom the witness himself could not testify about in this particular case. The picture of the plaintiff himself would not be objectionable, but the picture in its present form is objectionable.

Mr. Turtur: I offer the picture to show the condition of the plaintiff as of December, 1928, and it is immaterial as to who the rest of the people are. However, to satisfy the objection of my adversary as to the rest of the people, I [fol. 66] will now ask the plaintiff who the rest of the people are in the said picture so as to have them properly identified.

Mr. Rudner: I object to that question and the previous question. I do not object to Mr. Maty's picture by itself being offered in evidence, but I do object to a group picture under the circumstances of the case of persons other than the plaintiff, particularly with regard to the persons who do appear in that picture.

Mr. Turtur: I press my offer.

The Commissioner: I think it would be better to offer the picture for identification and to let the Judge rule.

Mr. Turtur: As I understand it, my adversary does not object to the picture as to Mr. Maty himself. I offer it in evidence, and I understand you have no objection to the offer, if it will only show the picture of Mr. Maty.

Mr. Rudner: If a paper is pasted over every one of these [fol. 67] people except Mr. Maty I won't object to it, but until that is done, I object to the offer.

Mr. Turtur: I consent, and I promise my adversary that before the same will be shown to the Court or jury, a paper will be pasted over the other persons in the photograph other than Mr. Maty.

The Commissioner: Mark it for identification, and you can renew your offer at the trial.

Mr. Turtur: There is no objection to the evidence as to Mr. Maty, and I consent now to overcome his objection.

(The photograph referred to was marked "Plaintiff's Exhibit 8 for identification".)

By Mr. Turtur:

Q. In the latter part of November, 1933, when you stopped working at the Grasselli Chemical Company, how were you feeling? Why did you stop working?

A. I was feeling sick, and I stopped work from my itch, so I could not walk.

[fol. 68] Q. You could not walk or you could not work?

A. Not work, and not walk; inside of the house I could not walk.

Q. How did you feel with reference to your other things that you testified about?

A. I was sick all over, everything is bad, getting weaker, and that's why I left the job.

Q. Do you know how much you weighed in 1928 when you started to work for the Grasselli Chemical Company?

A. I weighed 152 or 154.

Q. How much did you weigh in November, 1933, when you could not work anymore?

A. I guess 139, 141, like that.

Q. To whom did you talk in November, the latter part of 1933, when you say you could not work anymore because you were feeling sick all over?

A. The company doctor.

Q. You remember the company doctor's name?

A. I don't know his name; he is not here now. He is in the plant now.

Q. You think he is in the plant yet?

A. Yes, I think he is in the plant.

Q. You have not been there since November, 1933, have you?

A. I was not.

[fol. 69] Q. Then you don't know whether the company doctor is still there, do you?

A. No.

Q. Did you speak to anybody else?

A. No, because the doctor called Mr. High, "What we going to do with George Maty?" "We have to put him under special doctor."

Q. Was that conversation in your presence? Did he talk to Mr. High over the telephone?

A. Over the telephone to the office.

Q. Did you hear the doctor talk?

A. He talk, but I don't know what he said.

Q. I mean, did you hear the doctor talk?

A. Sure.

Q. What did the doctor say to this other person at the other end?

A. Well, that is all what I know, what he telephoned to Mr. High, "George Maty come over here and he says he ain't going to work no more, he can't go to work. What are we going to do with him?" That is all what I know.

Q. What happened after that?

A. They put me under the special doctor.

Q. What special doctor?

A. Mr. Oleynick again.

Q. You mean Doctor Oleynick?

A. Yes.

Q. For how long were you under the care of the doctor?

A. To 28th of January.

[fol. 70] Q. To 1934?

A. 1934.

Q. What happened on the 28th of January, 1934?

A. They sent me back to the company.

Q. He sent you back to the company?

A. Yes.

Q. Who sent you back?

A. Mr. Oleynick. He says, "You can go to work now."

Q. Before Doctor Oleynick said that you could go to work now, why did you take those samples of chemicals in November, 1933?

Mr. Rudner: I object to that as incompetent, irrelevant and immaterial other than the fact that he took these samples. Anything beyond that is a mental state of mind and involves mental processes which are not allowed in this particular case. We deal with facts and not with thoughts.

Mr. Turtur: I will withdraw the question.

By Mr. Turtur:

Q. In January, 1934, you said you spoke to Mr. High and that the doctor sent you back to Doctor Oleynick and he said you could work?

A. He said I could work.

Q. How did you feel in January, 1934?

A. I don't feel good, but he says, "You going to get better", and he gave me prescription, and I buy this salve [fol. 71] right here in Linden, and the company give me the money back for it.

Q. The company gave you the money back for it?

A. Yes.

Q. How did you feel? Tell us how you felt when you went back?

A. Sick all the time.

Q. What were some of the things that were wrong with you?

A. The most was I was coughing all the time, I can't eat, getting weaker. I don't know what is the matter with me. I was sick all over. Everything was the matter.

Q. Did you feel any of those things that you testified you told Doctor Ward?

A. What do you mean?

Q. I mean all those things that you said before.

A. Sure, I feel them worse.

Q. You feel all those things worse?

A. Worser.

Q. The doctor said "you can go to work now", and he gave you a prescription and you filled it?

A. Yes.

Q. Did you go to the plant then?

A. I went to the company hospital to see the doctor, and the doctor says, "Well, George, I ain't got nothing to do for you; go and see Mr. High."

Q. Did you go to see Mr. High?

A. I went up in the office and see Mr. High.

[fol. 72] Q. Mr. High is that gentleman sitting in this room now, the Assistant Superintendent (indicating)?

A. Sure.

Q. What did Mr. High do or say when you went to see him? What did you say to him and what did he say to you?

A. I went in there, "Good morning". "Hello, George. Mr. Oleynick says——

Q. Do you mean Doctor Oleynick?

A. Yes. "He says you are well, and here is the money for your hand, compensation, and that's all, we are through." I says, "How am I well? Look, here is a prescription. You have give me the money what I got just for the salve." He said, "You are well?" I said, "No, I don't want no money; you get me all well, and then I take my money and I go to work." He says, "Well, it is up to you." I said, "You give me new compensation?" "No, you won't get no compensation now; if you take for the hand, then I will give you compensation.

Q. What was the matter with your hand?

A. It was twisted.

Q. Did you make any demand for money for that twisting of the hand?

[fol. 73] A. He give me $115.

Q. When you indicated before, you indicated the wrist of your left hand, is that so?

A. Yes.

Q. What else was said by Mr. High? What did he do about your job? Did he want to give you work?

A. He says he won't give me no work. I says, "Mr. High, if I take this money, I am well. I want to cure myself. It looks like I got a hernia. What am I going to do? He said, "Well, you can get operation. You go up to Mr. —" some little fellow with a little moustache——

Q. What job did he have? A. He was doctor at the plant, but he was in the plant for a little while, Doctor Franklin.

Q. He told you to go to Doctor Franklin? Mr. High told you to go to Doctor Franklin?

A. "Go to Doctor Franklin, and he will make you operation cheap and he send you now to General Hospital."

Q. Did you say anything further to Mr. High about your job and did he say anything further to you when you talked to him?

A. No, he didn't say nothing; he just says, "You ain't got no job here in the summer because the itch going to catch you."

Q. Did he say from what the itch was going to catch you?

A. Worse and worse, the itch going to catch me.

[fol. 74] Q. Did he say from what the itch was going to catch you worse and worse?

A. Around the chemicals in the summer, and I itch when it comes on.

Q. He said that around the chemicals your itch is going to get worse?

A. Yes.

Q. What else was said by you and by him?

A. Then I didn't say nothing; I didn't take no money, and I went home.

Q. When you came home, that was in January, 1934?

A. I came home in January 29, and I was in his office about the first of February.

Q. I am not talking about 29, I am talking about January, 1934.

A. 34, yes.

Q. Do you mean January 29th, 1934?

A. Yes, and then maybe the first of February I was down in the office.

Q. Did Mr. High promise you that he would give you a job later on?

A. I din't take no money until the 18th of April, and then I went in there because I didn't have no money, and I was curing myself.

Mr. Rudner: I object to that and ask that it be stricken out, that he had no money. That is improper and irrevelant and incompetent in this case, and it is not a statement as [fol. 75] between him and——

Mr. Turtur: I think that ought to be stricken as to having no money.

The Witness: I went after money for my hand, and Mr. High says, "well, George——"

By Mr. Turtur:

Q. When was that? When did you go for the money?

A. 18th April, I know the date.

Q. 1934?

A. 1934; I took the money, and I was sitting on one side of the table, and Mr. High was sitting on the other side of the table, and he said, "Well, George, when you get well and you get your abscess out, come around in the winter time, and we will give you a job." I don't say I want a job or nothing, just I went home. Then I went to Newark to the state doctors, and I told Mr. Leggett (?), and they don't want to cure me, they give me nothing. Some fellow from Delaware, he went to the state doctor in Elizabeth, and he says—

Mr. Rudner: I object to that.

By Mr. Turtur:

Q. You went to the state doctor in Elizabeth? He said what? Who are you speaking about?

A. The doctor and Mr. High.

[fol. 76] Q. Was Mr. High there when the doctor spoke to you?

A. Sure, and that fellow from Delaware.

Q. Whom did the fellow from Delaware represent?

A. I don't know; Mr. High says he is same fellow like him.

Q. You don't know who this other gentleman was?

A. No.

Q. Who told you that this gentleman was from Delaware?

A. The doctor was asking who is that fellow, and Mr. High says, "He is same fellow as me from Delaware". That is all what I hear.

Q. As a result of the conversation with the doctor on the 18th of April, what happened between you and Mr. High?

A. Well, nothing, because I wanted the company to cure me and give me compensation.

Q. From there on did you get better or worse?

A. I was treating myself and the itch was getting badder and around here getting worse (indicating).

Q. You mean around your testicles?

A. Around my testicles and my body and hernia getting weaker and weaker.

Q. You mean your hernia?

A. Yes.

Q. What else was getting weaker and weaker?

[fol. 76½] A. I was myself getting weaker and weaker because I could not eat, I could not breathe, I could not do nothing.

Q. How about your cough?

A. Coughing all the time, worser; all the time heavy breathing comes out shorter.

Q. When did your hernia finally come out?

A. When I was under Doctor Oleynick.

Q. That was in January, 1934?

A. January, 1934, yes.

Q. You say that your hernia came out in January, 1934?

A. I am worser.

Q. In January, 1934, where did you go and what for?

A. I was treating myself for the itch, and my skin was thick all around here, and I am sick from that and from my rupture, and I am going to get it out anyway, and I have to get it out, I am not going to live with that, and then I went to the hospital, and he gave me operation.

Q. To what hospital did you go?

A. The Alexian Brother's Hospital in Elizabeth.

Q. And they operated on you there for what?

A. On the rupture.

Q. For the hernia?

A. Yes.

Q. How long were you in the hospital?

A. I was in there for seventeen days and I come back.

[fol. 77] Q. When you went to the hospital were you still feeling the same way that you spoke about, this condition of coughing, weakened condition, sleeplessness and everything else that you spoke about before? Did you have the cough when you went to the hospital?

A. Sure, same way.

Q. Are you sure of that?

A. Sure.

Q. How long did you remain in the hospital?

A. I was in there seventeen days.

Q. Then what did you do?

A. I come home, and I was home for three days sitting outside, and some fellows over here and my wife was sitting by me and just something I started to cough, and something come out and down and up and down and up and I started to throw up a lot of bad things.

Q. Do you mean spit?

A. Spit, the first time yellow stuff went out, and then went out white stuff, and just the same come out all the time.

Q. That was twenty days after you were operated that this stuff started to come out from you?

A. Yes.

Q. And ever since the twenty days after you were admitted to the hospital in June, 1934, have you been spitting this stuff?

A. Every day, every half hour.

Q. And how much of that stuff do you spit a day?

[fol. 78] A. About a pint every day.

Q. One pint a day?

A. Yes.

Q. Did you go back to the hospital?

A. I was because I don't know what is the matter, I started to throw that out, and on Monday I went back to the hospital, and they took a picture of me.

Q. You mean x-rays?

A. Yes, x-rays.

Q. How many x-rays did they take?

A. They only take one first.

Q. After that did they take some more x-rays?

A. Sure.

Q. When?

A. They took about six, Dr. Schilling took pictures of me because I was under Doctor Schilling about five days. Now this year when I went to doctor he took six of me now.

Q. Doctor Schilling is the man that treated you at your home?

A. Yes.

Q. How long did Doctor Schilling treat you?

A. First time he treat me three weeks and Doctor Steel from Linden.

Q. And then Doctor Schilling treated you for fourteen months?

A. Yes.

Q. Every day or every week?

A. Every week he come to the house and give me medicine—not medicine, but he gives me prescription.

[fol. 79] Q. Do you know how much you paid Doctor Schilling?

A. Sure, I know how many weeks because when I was in the hospital, I don't count that.

Q. How much did you pay for the hospital?

A. I know.

Q. How much?

A. In New York——

Q. Not in New York, but I mean the Alexian Brother's Hospital in Elizabeth?

A. $69.

Q. That is for the operation and the hernia?

A. Yes.

Q. Do you know how much it was for your x-rays?

A. That is the picture, no, for one x-ray in that time.

Q. Was it the Memorial Hospital in New York that you went to after a while?

A. Yes, it was fifteen days.

Q. And that was $69.

A. $67 in the Memorial Hospital.

Q. Do you know how much it was at the Alexian Brother's Hospital?

A. $69. I don't pay all yet. That is only for one x-ray.

Q. Do you know how much you paid Doctor Schilling?

A. I know.

Q. How much?

A. Fifty-seven weeks, that makes——

Q. How much a week?

A. $3 a week and five pictures.

Q. Five x-rays?

A. Yes, he was looking at me and he charged me $5.

[fol. 80] Q. There were five x-rays, and it was how much for one x-ray?

A. Five dollars.

Q. Five dollars for each x-ray?

A. Yes.

Q. After that when did you go to the Memorial Hospital?

A. I was there in June—July.

Q. 19 hundred and what?

A. 35.

Q. Do you know how many days you remained in there?
A. Fifteen days.

The Commissioner: We will take a recess at this time.

(A brief recess was had.)

By Mr. Turtur:

Q. After the Memorial Hospital where did you go?
A. I come home.
Q. How did you feel?
A. Bad.
Q. After that where did you go?
A. After what?
Q. After you came home from the hospital?
A. I don't go no place; just I get doctor.
Q. Were you in bed all the time?
A. I take sometimes a little bit walk outside when it was good weather and no wind and not cold.
Q. How long have you been in bed all the time?
A. From September 9th or 10th, when it was rainy times.
Q. 1935?
A. Yes, and at that time I lay in bed.
[fol. 81] Q. You never got up since last September?
A. No.
Q. Did you go to the hospital again?
A. I was in the hospital; it was too heavy on me and Doctor Schilling took me for operation. He took me in hospital for operation.
Q. How long did you stay at the hospital?
A. Three months and a half.
Q. What hospital was that?
A. Alexian Brother's.
Q. Did they take some more x-rays?
A. Yes.
Q. Are you sure about the number of x-rays they took?
A. I don't know the number.
Q. So that if there are more x-ray- then what you have already stated, you may be mistaken?
A. Maybe more.
Q. How much did you pay to Doctor Steel?
A. $15 for three injections for three weeks.
Q. Did you pay him any more?
A. No.

Q. Do you know how much your bill was for hospitalization for the three and a half months?

A. I don't know, because I was in two rooms.

Q. Do you know when it was that you were three and a half months in the hospital?

A. From October 1st, 1935, to the 16th of January, that is three months.

Q. 1936?

A. Yes.

[fol. 82] Q. Then from January, 1936, you have been at home in bed all the time?

A. Yes.

Q. Do you feel better or do you feel worse?

A. Worse, all the time worse.

Q. How about this spit? Do you get the same amount of a pint a day or more?

A. Same, same thing.

Q. One pint a day?

A. Yes, if you don't get it in the daytime, you get it in the night.

Q. Do you sleep well?

A. No.

Q. Do you eat well?

A. No, I only drink milk for the morning and eggs.

Q. Do you know how much you weigh now?

A. No.

Q. When you started to cough in the latter part of 1931 did the company doctor do anything for you?

A. No.

Q. Did you tell them about it?

A. I told them, and they tell me that I am only thinking I am sick, and I am coughing.

Q. To your knowledge did the company have any ventilating system at all other than the windows which you talked about while you were working there? Did they have any exhaust fans or machines to take out these fumes and odors and powder and chemicals?

A. There was none, nothing at all.

[fol. 83] Mr. Rudner: I object to that. There is no proof that the rooms or any part of them contained any powder, chemicals, or anything. The only testimony is that there was dust.

By Mr. Turtur:

Q. Referring to this dust that you spoke about before where you were working, what kind of dust was it?

A. The first time only soda ash for two years to 1931.

Q. And in 1931?

A. They started to work metasilicate and they mix together.

Q. What was this dust?

A. Powder.

Q. What powder? Salicate and what else?

A. Laundry powder or metasilicate.

Q. What else?

A. That's all.

Q. Didn't you say something about soda ash?

A. Soda ash, that is why I said that there was silicate and soda ash.

Q. Referring to this dust that you spoke about, which was as heavy as you explained, was that chemicals that you just spoke about now?

A. I don't understand.

Q. I want to know what this dust was, what kind of chemical this dust was.

A. No, only that dust from metasilicate and from the [fol. 84] soda ash.

Q. How about that dust when you worked in the phosphate department?

A. That is dust.

Q. What kind of dust was there?

A. That is only from the rock, phosphate rock.

Q. What kind of dust was it that you spoke about when you said something about caustics?

A. Caustic? They mix metasilicate with caustic, some powder.

Q. During all this time that you worked there and had this dust condition that you spoke about, did the company have any kind of machinery or fans that would take out this dust as soon as it came in, or would it stay there all day long?

A. There was no machine and no fans, no nothing.

Q. During the eight hours work that you worked there, was this chemical dust condition present every day, or were there some days when it was worse and some days better?

A. When it is foggy I could not see you from the other end and when it stays foggy in the winter time and rains, but when it is clear like this you can see the man a little bit closer, but it lays anywhere, and as soon as you go in there, you get it when it is running.

Q. Was it running all the time? Was the metasilicate department and the soda ash of this factory running all the [fol. 85] time?

A. Soda ash department running all the time, but metasilicate I hear now——

Q. Don't tell us what you hear. Just tell us how they ran when you were there until November, 1933.

A. They run all the time.

Q. How often would it run?

A. They make one hundred barrels or how much they need, and they stop, and they sell them, and they start again.

Q. How long a time would expire, one week or two weeks?

A. Sometimes three days, sometimes one week, sometimes two weeks.

Q. Would there be any of this chemical dust—that is what you mean, chemical dust?

A. Yes.

Q. Would there be any chemical dust coming from the conveyors when they dumped this various material into the hoppers?

A. Sure, from the glass it comes like powder and same dust.

Q. What do you mean by glass?

A. Silicate glass, when we dump it in the chute, that is what makes dust.

Q. Lots of dust?

A. Lots of dust.

Q. Did they have anything over in the silicate department to cool off that material?

A. They have what they make the silicate powder, laundry powder, they have a little fan in there to cool that stuff [fol. 86] that is thrown out.

Q. When they used that fan to cool the stuff that it throws out, did that make any chemical dust?

A. That don't make the dust, just pushed the dust more over.

Q. More?

A. More near the place, and it goes all over.

Q. From what department?

A. From the silicate department.

Q. To what department?

A. To our department.

Q. Where you were working?

A. Yes.

Q. When this was done did they tell you that this was bad for you?

A. No.

Q. When this was done, did they give you any respirator?

A. No.

Q. Did they tell you to be careful?

A. No.

Q. Were the windows open all the time or shut most of the time?

A. We only shut the windows when big rain comes.

Q. Were all the windows open or shut?

A. No, not all the way, about half.

Q. I am talking about all the windows. Were they open? Were some of them open and some closed or were they all open?

A. Some they shut.

Q. So you could not move them?

A. They was all the time open—I mean they was all the time shut so you could not touch it.

[fol. 87] Q. Where were these windows open in the factory, up above or down below?

A. Down below and up above the windows would be open.

Q. When these windows would be open, would that take out all this stuff?

A. No, it makes whirl around me, and on the floor.

Q. Did you ever complain to your foreman or superintendent or anybody in charge regarding the cause, and if you did, did they say anything?

A. I don't see no bosses.

Q. You are sure of what you stated before, that at no time did you know that these chemicals were harmful to you? Is that so?

A. I didn't know nothing about them.

Q. When did you find out the first time?

A. 1931.

Q. No, I am talking about when you found out for the first time about these chemicals?

A. Oh, when the doctor examined me.

Q. That is the time?

A. That is the only time.

Q. That is when he mentioned the word *chemical?*

A. Yes, he says, "If you had those chemicals, you would die, from them."

Q. If it comes in your head?

A. He say that is bad.

Q. But nobody ever told you to watch out for these chemicals nor did you ever know that these were harmful to you?

[fol. 88] A. Ugh, ugh.

Q. What did you mean when you said *Ugh, ugh?*

A. He say the chemicals is bad for me.

Q. That is the first time that you found out, when this doctor examined you in the latter *of* part of October or November, 1933, is that right?

A. Yes.

Q. When you cleaned these gas partitions, how often did you clean them? Do you know?

A. Sometimes two times a week, sometimes three times a week.

Q. When you cleaned them, did any odors of any sort come out?

A. Sure.

Q. What kind of odors was it? Do you know?

A. From the coal, that stuff what you have in the chimney.

Q. Coal gas?

A. Yes.

Q. Is that what that is?

A. Black stuff, from the chimney.

Q. Soot?

A. I don't know.

Q. Did you get any respirator for that?

A. No, we don't use respirator.

Q. Was there any chemical dust around these platforms and steps where you were working around the furnaces?

A. All over chemical dust, all over the plant when we work.

Q. How about the floors of the plant? Were they clean [fol. 89] all the time or were they full of chemical dust, too?

A. You clean it when it is dry. That stuff when it is warm, gets melted down.

Q. How about this side door of the silicate department? Does that remain closed or open most of the time?

A. Which door? Outside?

Q. Yes, between the silicate department and furnace number one?

A. There is no door, only from where they make the metasilicate, that is the only door.

Q. Is there another door over on the other side from where they make the metasilicate?

A. Yes.

Q. Why did you say no? Please be careful how you answer.

A. I don't understand.

Q. If you don't understand any of my questions, please say so and don't answer if you don't understand. Is there a side door, that one outside the building, where they store any barrels in the silicate department? Is there a big wide door there?

A. Yes.

Q. You remember that now?

A. Yes.

Q. Was that closed or open most of the time when they were making metasilicate?

A. Those doors, they used day time and open all the time.

Q. While you were working?

A. Yes.

[fol. 90] Q. Did any draft come through there?

A. Sure.

Q. When they were making silicate and this door was open and this draft was there, did that bring the chemical dust more around you?

A. That draft comes in and then throws it on my place.

Q. Where you were working?

A. Where I was working and carry everything, all dust, upstairs.

Q. Do you mean where the tunnel or conveyor was, is that so?

A. Yes.

Q. Regarding this conveyor above the furnace number one and number two and also number three, you said that there were some holes there, and that when this soda ash and other chemicals are going through there, they would fall through the holes and come right on top of you, is that right?

A. Yes.

Q. Were there many holes there at that time?

Mr. Rudner: I object to that. There is nothing in the scope of the pleadings or bill of particulars about any defects in any equipment.

Mr. Turtur: I press the question for the same reasons before as being very material and relevant to show the improper working conditions of the plant.

[fol. 91] Mr. Rudner: It is also incompetent, irrelevant and immaterial to the issue in this case.

By Mr. Turtur:

Q. Were there many holes?

A. There were so many holes, a whole lot of holes all over. On this new one they have holes, but not like on the old ones.

Q. You said the old [illegible] so many holes, what kind of a tunnel was it?

A. From the sheet iron.

Q. And you say there were many holes?

A. Yes.

Q. When was this present tunnel put up there?

A. 1930.

Q. And up to two years before that there were holes?

A. They were in the old tunnel.

Q. You say that there were lots of holes in the old tunnel?

A. Yes.

Q. When this chemical used to come through there, was that the stuff that came down upon you while you were working there?

A. Come down and dropped like rain.

Q. When this new tunnel was put up, you said that there were not so many holes there as there were in the others, is that so?

A. Yes.

Q. But after this new tunnel was put up in 1930, was [fol. 92] there still this chemical dust flying around from this tunnel there and other places where you were working?

A. Yes, and from the mixer and from the chutes.

Q. And from the pulleys, did you say before?

A. Sure, they have a couple of pulleys, I don't know how many.

Q. How many pulleys were there?

A. I don't know.

Q. Were there a lot?

A. It was not such a lot like on the old ones, but they started to fix them up.

Q. What kind of treatment did they give you at this hospital?

A. In the hospital?

Q. What did they do for you?

A. They only examined me in the hospital every second day. They take me and look all over me every second day, and when I come back in the hospital, they give me light treatment.

Q. Which hospital is that? The Alexian Brothers?

A. Alexian Brothers. They call it sunlight and put electric machines on me to keep warm.

Q. Do you know what else they did for you?

A. Nothing else.

Q. How often was it that this dust was so thick, like smoke, as you say, that you could not see the fellow before you, this chemical dust?

A. When it was foggy.

Q. How many days a month or a week?

A. It is what kind of weather was outside. I don't remember.

[fol. 93] Q. It depended upon the weather?

A. Yes.

Q. Was there a heavy amount of dust there every day regardless of the weather?

(The interpreter repeated the question in Slavish).

(In English.)

The Witness: Yes, it was dust every day no matter what kind of nice day.

By Mr. Turtur:

Q. Was it heavy dust or a little dust?

A. Heavy dust and from the metasilicate and soda ash it is the same thing.

Q. When this dust would get up above, you say it would come down towards you?

Mr. Turtur: Cross-examine.

Cross-examination.

By Mr. Rudner:

Q. You worked in the Perth Amboy Copper Works for about seventeen years until the summer, July, 1928, is that right?

A. Right.

Q. During that period of time you went across the ocean to go to war, is that right?

A. Yes.

Q. When did you start working at the copper works?

A. 1910.

[fol. 94] Q. When did you leave the copper works to go to war?

A. I leave the copper works to go to war in 1913 in Christmas.

Q. Christmas of 1913?

A. Yes, I went on vacation, not to war.

Q. You went on vacation?

A. Yes.

Q. And then you stayed there and went to war?

A. Yes.

Q. Five years.

A. Five years.

Q. Were you actually in the battle front fighting?

A. Yes.

Q. When did you come back to this country?

A. 1922.

Q. You stayed across until 1922?

A. Yes.

Q. You left this country in December, 1913?

A. Yes.

Q. And you stayed away until 1922?

A. Yes.

Q. Then you stayed in Europe after the war for a few years?

A. Yes.

Q. How old were you when you came to this country the first time?

A. About sixteen.

Q. When you were a child did you have the measles?

A. I don't remember.

Q. Did you have any chest colds as a child?

A. I don't remember.

Q. Do you remember if you had colds?

A. No, I don't remember.

[fol. 95] Q. Do you remember?

A. No.

Q. Do you remember any sicknesses you had when you were a child?

A. No, I have no sickness. My mother said——

Q. Never mind that. What do you know about it?

A. That is all what I know, what I remember, I never was sick.

Q. Did you have chicken-pox or smallpox?

A. No.

Q. You started to work for Grasselli in October, 1928?

A. Yes.

Q. That was after returning from Europe from vacation?

A. Yes.

Q. And from the very start you started to work in the silicate department?

A. Yes.

Q. And when you started working you were assistant to the furnace man?

A. Yes.

Q. You were a helper?

A. For two weeks I was a helper.

Q. You were a helper to a furnace man?

A. Yes.

Q. And at that time they had only the number one and the number two furnace?

A. Yes.

Q. They did not have number three?

A. No.

Q. After those two weeks you became a furnace man?

A. Yes, put me on the furnace.

Q. How many men worked on the furnace?

A. One on the two furnaces, and I had a helper on the [fol. 96] other side to clean the chutes.

Q. How many men worked in the whole furnace room?

A. Do you mean the whole plant?

Q. The whole furnace room?

A. I had two men on the producers partitions, and after that I had another clay man, and when I want to pull that stuff up, I had a place to put that in.

Q. That was another man?

A. A helper. I had four men.

Q. That is, four men besides yourself?

A. Yes.

Q. That was the situation the whole time that you were there?

A. That was the whole time.

Q. Those furnaces are oil burners?

A. First when I started to work it was gas.

Q. And then oil?

A. Then we put in 1930.

Q. The number three furnace is oil burning?

A. Yes.

Q. How long did you work in the silicate department all told from 1938? When were you transferred?

A. To 1933, May or April they transfer me.

Q. To where?

A. To that soda—I mean phosphate department.

Q. So that from October, 1928, when you say you started, until May, 1933——

A. Yes.

Q. (Continued) —you worked in the silicate department?

A. Yes.

[fol. 97] Q. And from there on you worked in the phosphate department?

A. Yes.

Q. That was in a different department?

A. Yes.

Q. Under a different foreman?

A. Different bosses.

Q. How far away from the silicate department was the phosphate department?

A. Maybe five hundred feet, maybe four hundred feet.

Q. It is quite a distance away?

A. Yes.

Q. A different building?

A. Yes.

Q. After you were transferred to the phosphate department, you never went back to the silicate department to work, did you?

A. No.

Q. It that correct?

A. Yes.

Q. That was a complete transfer from the silicate department to the phosphate department?

A. Yes.

Q. You had nothing to do with the silicate department at all?

A. No.

Q. That was in May, 1933?

A. Yes, May or April, I don't know.

Q. The furnace room is a big room, isn't it? It is a very big, long room?

A. The old one? The whole business?

Q. Yes.

A. That is not so long; how many feet I don't know if you have there two hundred feet long.

[fol. 98] Q. Do you think it is about two hundred feet long?

A. I would say over two hundred feet long.

Q. How wide is this furnace room?

A. It may be about eighty feet or ninety feet, like that.

Q. Eighty feet or ninety feet wide and over two hundred feet long?

A. Yes, I think so.

Q. And it is a very high building?

A. One is high and the other one is low.

Q. The number three furnace is high?

A. Yes.

Q. And the other one is low?

A. Yes.

Q. And there are lots of windows in that room?

A. In the new one, yes.

Q. You mean around the number three furnace?

A. Yes.

Q. How many doors are there in that furnace room?

A. One.

Q. I mean how many doors were in the furnace room when you were there?

A. One door from outside, that's all.

Q. Where was that door?

A. On the side.

Q. Near where?

A. Near the furnace.

Q. Which furnace?

A. Number three.

Q. Weren't there some doors on the other side leading into the mixing room?

A. Yes, there was one door.

Q. And there is another door leading to the metasilicate room?

A. There is a door.

[fol. 99] Q. This metasilicate rom is a different room from the furnace room?

A. Yes.

Q. Different walls?

A. It has.

Q. Do you understand my question? How many rooms are there next to the furnace?

A. There is one room where they call the warehouse, and you go in, and then the next room is where that machine is where they make the metasilicate, and the third room is where they have the machine where they make the silicate from water.

Q. Water?

A. Yes.

Q. They mix something with water? It is wet?

A. They put the silicate in and we cook it and take the water from the silicate out. That is three rooms.

Q. Is that the room near the furnace room?

A. Maybe about thirty feet or twenty-five.

Q. It was a different room?

A. That is a different room.

Q. The furnace room is a room by itself?

A. Yes.

Q. Did you work all the time in the furnace room while you were in the silicate department?

A. Yes.

Q. You worked in no other rooms?

A. I was working in this cooking room where we cooked the silicate in.

Q. How long did you work there?

A. For a month and a half, I know when they fixed the furnace, I was working in there.

[fol. 100] Q. When was that?

A. 1931, I don't know what month.

Q. Outside of working for a month and a half in that room where they mixed that soda, or whatever they mixed, you worked all the time in the furnace room while you were working in the silicate department?

A. Yes.

Q. That would keep you in this furnace room all the time?

A. Yes, I was working——

Mr. Turtur: I object on the ground that it tends to show that there is an enclosure about the department where the furnace was, and there is no enclosure, as a matter of fact. There is no room within the meaning of the word room. It is a large area.

By Mr. Rudner:

Q. When I say room, I mean the four walls and the furnace, a great big space with the furnace. You worked in that place, is that right?

A. Yes.

Q. While you were working on the furnaces, did you stand in one position all the time, or did you go to various parts of the furnace room?

A. I have to go all over. I have to look after everything.

[fol. 101] Q. You would not be standing in front of the furnace all the time?

A. No.

Q. What would you do? What work did you do in the furnace room?

A. Well, I have to watch the fires, for one thing, and another thing, I filled those furnace with soda ash and sand and melt that, and I melt that and that water, and I go on the other side and let it out.

Q. When you say that you filled the furnace with soda ash that is all enclosed in pipes, isn't it?

A. It comes down in chutes and you feed it from the chutes.

Q. It comes down from the chutes into the feeder, which is part of the furnace?

A. Yes.

Q. The feeder is part of the furnace?

A. Yes.

Mr. Turtur: I don't think he understands the question, because he is answering yes to something that is not so.

By Mr. Rudner:

Q. This soda ash and sand came through the pipes?

A. No, they come from the chutes.

Q. The chutes are pipes, aren't they?

A. No, they are not pipes, they are too big. It is in the bottom.

Q. Are the chutes round?

A. No.

Q. Are they square?

A. Square.

Q. They are all enclosed?

A. That cannot be closed because the chutes goes in the
[fol. 102] feeder. The chute is on the side.

Q. This mixture comes through the chutes and it goes into the furnace?

A. Yes.

Q. And in the furnace it is melted?

A. Yes.

Q. And on the other side it comes out like fire, molten lead?

A. Like water.

Q. A fire color?

A. Yes.

Q. It flows out?

A. Yes.

Q. And then is cooled in squares?

A. Yes, all the furnace was running in the water in a big renovator, and on the other side it was come out in the cars glass.

Q. There was water being poured over the glass?

A. That water was cooling it all the time.

Q. And then the glass is carried away?

A. They make silicate from that glass.

Q. Did you have to go to another part of the building in connection with your work in the furnace room?

A. I have to go upstairs because they are supposed to dump the cars.

Q. During the course of your eight hours a day you would be going all over this factory?

A. Yes.

Q. It is a big furnace room?

A. Yes.

[fol. 103] Q. You would go from one place to another place?

A. Yes.

Q. That would be during all the day?

A. Yes, I was watching the furnace and watching the water, and when I want water, I have to go in another room.

Q. Did you have to push buggies?

A. Yes.

Q. And empty the buggies?

A. Yes, I empty the buggies into the chutes.

Q. Did the other men help you do that?

A. Yes, I had helper. I had two furnaces, and I had a helper.

Q. During the whole time you worked in the silicate department, you worked as a furnace man in the furnace room except for a month and a half while you worked with the metasilicate?

A. Yes, only one month.

Q. That is the metasilicate room?

A. Beside the metasilicate room, because that is another room. They have two machines.

Q. What did they do with those machines?

A. That make the water white. They put silicate in that machine, and I have to take and cook that, so I take the water out of the silicate.

Q. It is pretty hot around the furnaces while the furnace going?

A. Yes.

Q. That is from the heat coming through the furnace?

[fol. 104] A. Yes.

Q. And that made you perspire quite a lot?

A. Yes, it made me sweat all the time.

Q. Of course, you know that when you get near heat you have to sweat? You knew that?

A. Yes.

Q. And in the summer time you also sweat even though you did not work near the furnace?

Mr. Turtur: I object to that as calling for a different kind of perspiration. One is from toil, and the other is from the natural heat of the sun.

By Mr. Rudner:

Q. What I am asking you is this: While you worked at Grasselli and during the summer time when you were not working on the furnaces, you also had to sweat and perspire?

Mr. Turtur: I object to that is immaterial, irrelevant and incompetent as to this issue.

The Witness: Sure, around the furnaces you got to sweat all the time, you work or just walk around, you got to sweat.

By Mr. Rudner:

Q. I mean when you were not working on the furnaces in [fol. 105] the summer time, when you were around the street outside, did you also sweat in the summer time?

A. If it was hot, sometimes you got to sweat.

Q. There were quite a lot of windows in this room with the furnaces?

A. Not in the old one.

Q. I mean around the number three furnace.

A. A lot of windows.

Q. Were the windows downstairs?

A. Downstairs and upstairs, three story windows.

Q. There were windows all around the number three furnace?

A. Yes.

Q. How about on the roof? Were there open ventilators or circulators? Is there an opening on the roof?

A. Do you mean these round things? There is only one, I think. I don't know whether it is open or not.

Mr. Turtur: When?

By Mr. Rudner:

Q. While you were working there, were these round things on the roof opening outside of the roof?

A. No.

Q. Did you see that opening in the roof?

A. No, I never saw it was open.

Q. You mentioned the word *one*. What were you talking about?

A. I only see one round thing.

Q. You did see that one round thing?

[fol. 106] A. Yes.

Q. That was while you were working as a furnace man?

A. That is under the chute, under the conveyor, way up; you cannot see if it is open or not.

Q. That is in the ceiling or the roof?

A. Yes.

Q. You say that the tunnel over number one and two furnaces was full of holes?

A. It was full of holes.

Q. When did you first find out about the holes in the tunnel?

A. When I start to work it is coming down all the time.

Q. Did that keep on coming down every day?

A. Every day.

Q. So long as you worked on number one and number two furnaces?

A. Yes.

Q. But you kept right on working nevertheless?

A. Yes.

Q. How about when you went to number three and you had new tunnels?

A. I had new tunnels.

Q. Did they stop work on the number one and number two furnace?

A. They stopped working, and they start number three.

Q. Did you start on number three furnace when they opened the furnace? The first time that they opened the number three furnace, did you start it?

A. I start it, I make it hot.

[fol. 107] Q. You were the first man to work on it.

A. Yes.

Q. And thereafter you kept working on the number three furnace?

A. Yes.

Q. You never again worked on the number one or number two?

A. No.

Q. Number three was a brand new furnace?

A. Yes.

Q. And brand new conveyors?

A. Yes.

Q. Everything was new?

A. Yes.

Q. The tunnel was new?

A. Yes.

Q. All the pipes were new?

A. Yes.

Q. After you started working on the number three furnace did you ever work again on the number one and number two furnace?

A. No.

Q. Were these gas producers on the number one and number two furnaces only?

A. Yes.

Q. Not on the number three furnace?

A. No, there is oil.

Q. So you had no cleaning to do on the gas producers after the number three furnace was opened?

A. They didn't clean them, not the new ones.

Q. That is because they operated on oil?

A. Yes.

Q. Can you tell what time of the year they opened that number three furnace?

A. 1930 in March.

Q. In March, 1930?

A. Yes, I don't know which day.

Q. What did you say about the dust condition after they opened the number three furnace?

[fol. 108] A. A lot of dust.

Q. The same amount of dust as before?

A. Yes, the dust shoots down the hole. The tunnel was all holes yet because they don't fix it yet good, and the soda ash and the soot get hot because the chute was too low by the fire and it don't want to drop down all the time; you have to go and hit it.

Q. Did the number three furnace have all new chutes?

A. Yes.

Q. When the number three furnace was open, there were all new chutes?

A. Yes, and there were holes when iron comes on to iron.

Q. That was from the very start?

A. Sure.

Q. They were new pipes and new tunnels?

A. There was no pipes.

Q. New conveyors?

A. Yes.

Q. New tunnels?

A. Yes.

Q. And you say you still had dust?

A. Yes, still dust. They started to fix it with some kind of black stuff.

Q. And seeing this dust, as you say you saw, you still kept working in the dust, is that right?

A. Yes.

Q. You said something about pulleys in the mixing room and furnace room. There were some pulleys somewhere?

[fol. 109] A. Pulleys all the time and dust come from there.

Q. Where did the pulleys come from?

A. The pulleys on the other side of the furnace right beside number one furnace, and the mixing room is on the other side of the wall.

Q. So the pulleys ran from the mixing room into the furnace room?

A. Yes.

Q. And you say that dust came from that?

A. Yes.

Q. When did you say that Mr. Davis closed up the openings around the pulleys?

A. I don't know which day, but I know I see them. I told Mr. Clark.

Q. When was that?

A. That was in 1929.

Q. And after you told him, they put something around the pulleys?

A. They put boxes.

Q. Wooden boxes?

A. Yes.

Q. Those wooden boxes were built around the pulleys?

A. Yes, but they don't fit on the sheet iron because the sheet iron, one place was lower.

Q. Did those boxes stay there?

A. They stay there and the dirt fall down from the pulleys and knock the box down.

Q. And they put the box back?

A. Sometimes they have to make new boxes up.

Q. That was done promptly?

A. Maybe they keep sometimes a month.

[fol. 110] Q. Before it was done?

A. Yes.

Q. And after the boxes were put up, did you tell Mr. Davis or anybody else that the boxes were not right yet?

A. We tell them.

Q. Never mind *we*.

A. I tell him, too, that this box is no good, too much dust come out, and he get it fixed.

Q. He fixed it?

A. Yes, but sometimes comes a week or two before he fix it.

Q. But it was fixed?

A. Yes.

Q. You told Mike Benkovitch about the holes in the tunnel, but you did not tell the boss, is that right?

A. Yes.

Q. Did this dust which you are talking about come from any other place except the conveyors and tunnels?

A. In 1929, no; in 1931 they started to work metasilicate, and it comes in everything.

Q. It came from the metasilicate room?

A. Yes.

Q. In 1931?

A. Yes.

Q. How long did that last while you were there?

A. All the time.

Q. While you worked in the silicate department?

A. Sure, all the time dust.

Q. Around furnace number three, right in back of the [fol. 111] furnace where you were standing, aren't there two big windows there?

A. Yes.

Q. They are open?

A. They are open.

Q. They are right near the furnace?

A. About fifteen feet away.

Q. How about farther away from the furnace and farther away from these two windows? Aren't there some more windows?

A. There is some more windows which you cannot open.

Q. There are some windows which you cannot open?

A. Yes.

Q. But they were open sometimes?

A. The high windows was never open on the second floor, just on the first floor.

Q. That was near where you were working?

A. Yes.

Q. I think you said that the first time you felt sick was after you had worked there for two years?

A. Yes.

Q. When did you first feel sick?

A. 1931.

Q. That was three years then?

A. That is only 1929 until 1930, that is only two years and a month and a half because in 1928 I was only working a month and a half.

Q. You started late in the year 1928?

A. Yes.

[fol. 112] Q. When did you leave the silicate department?

A. 1932, in the end of the year.

Q. You left the silicate department at the end of the year 1932?

A. Yes.

Q. And then were you transferred to the phosphate department?

A. Yes, the phosphate department, and then I worked outside two days, three days outside and two days inside for operator.

Q. Then what happened? Did you go back to the silicate department?

A. No, I stay there in the phosphate department.

Q. You were transferred to something in May, 1933. What was that? Is that when you were transferred from the silicate department to the phosphate department?

A. In May, 1932.

Q. May, 1932?

A. It looks like May or April.

Q. 1932?

A. Yes.

Q. Not 1933?

A. No.

Q. We want to make sure about the year.

A. I don't remember.

Q. How long did you work in the phosphate department?

A. I don't know. It is over a year, I know. It is more than a year.

The Commissioner: We will take a recess at this time.

[fol. 113] (A brief recess was had.)

By Mr. Rudner:

Q. Tell us when you did your last work in the silicate department.

A. 1932, but I don't remember the month. It was in May or April.

Q. In the spring of 1932?

A. Yes, they changed me to the phosphate.

Q. And thereafter you never came back to the silicate department?

A. No.

Q. In the phosphate department who was your foreman?

A. The foreman was——

Q. Mr. Hammond?

A. Mr. Hammond, yes.

Q. Mr. Thompson?

A. Thompson was all over.

Q. What was the first work you did in the phosphate department?

A. Started to dump rocks.

Q. Was that outside?

A. Outside three days, and they put me on the Dorr plant for operator and dry that out from the liquid what they make the liquid two days. I was like breaker man.

Q. You worked out doors on the rocks for three days?

A. Yes.

Q. What did you do outside?

A. Dump rocks in the chutes what we have.

[fol. 114] Q. What kind of rock is that?

A. Phosphate rock.

Q. Is it like pebbles or was it big pieces?

A. It was small pieces, like powder it comes.

Q. How would you dump that, by shovelling it off?

A. From the bag into the chute.

Q. Did you have to weigh it?

A. Yes, we have to weigh it, push it on the scales and weigh it, and push it on the chute and dump it down.

Q. That was all done outside?

A. Yes.

Q. Was that near the waterfront?

A. From the river? Yes, about fifty feet from the river.

Q. It is all open there?

A. Yes.

Q. You did that for three days?

A. Yes.

Q. Then what did you do? You went inside?

A. Two days.

Q. With the liquid?

A. Yes.

Q. You worked with the liquid two days?

A. Yes, in one week two days.

Q. That is wet, the liquid?

A. Sure, it is water, sulphuric acid.

Q. It is like water? Is it water or sulphuric acid?

A. It is mixed with sulphuric acid, and they call it liquid.

Q. It is not dry or sand?

A. No, it is not sand, it is wet.

Q. Where did you go then after those two days?

[fol. 115] A. Well, I had off two days, and then come back again. Sometimes I come back there and make liquid, and I work two days every week inside.

Q. Did you work two days a week every week?

A. Yes.

Q. For how long?

A. 1932 until I left the job.

Q. Until you quit?

A. Yes.

Q. That was October or November, 1933?

A. Yes.

Q. When did you leave the job, in October or November, 1933?

A. That is in November.

Q. During the whole time in that phosphate department, did you work two days making this liquid every week?

A. Yes.

Q. And the balance of the time you worked on the outside?

A. Yes, three days outside.

Q. Three days outside and two days inside?

A. Yes.

Q. So that when you worked outside it was always on the rocks?

A. Yes.

Q. Did that keep you outside all day?

A. No, I had to go inside to clean under the dryers what falls out from the belts.

Q. That would be swept up by you with a shovel?

A. Yes.

Q. And you would put that away some place?

A. Yes, I put it away.

Q. And that was also a wet operation? Was that stuff [fol. 116] that you picked up wet?

A. No, it is not wet; it is dry.

Q. What is it?

A. They sell that to this factory that make the rocks.

Q. Was it like mud?

A. Yes, but when it goes on the dryer it gets dry.

Q. When you picked it up, it was wet?

A. I pick it up dry.

Q. When was it wet? After a while?

A. That don't get wet.

Q. When you would pick it up, was it like mud?

A. It was like sand.

Q. When you picked it up?

A. I picked it up.

Q. What would you do with it after you picked it up?

A. I put it on the belt, and the belt carry it away in the chute.

Q. You did not see it anymore after that?

A. No.

Q. Referring to these various samples we have here, these exhibits, from what department did you get them?

A. From the silicate department and one from the phosphate department.

Q. When did you get the sample from the phosphate department?

A. Same day that I leave the job.

Q. That was in October or November, 1933?

A. Yes.

[fol. 117] Q. You were working then in the phosphate department?

A. Yes.

Q. And you went over to the silicate department and got these other samples?

A. After I get washed, then I go to the silicate department where nobody can see, and so I take this.

Q. What did you get from the phosphate department?

A. Phosphate soda and another kind of soda, too.

Q. From where in the phosphate department did you get the phosphate soda, as Exhibit P-5?

A. From the bag, from a busted bag up there.

Q. Were you working on the phosphate soda in the phosphate department?

A. On soda? I was working a couple of days on that.

Q. You were a couple of days on the phosphate soda?

A. Sure.

Q. When was that?

A. I could not tell you which month, but I know I was working a couple of days on that.

Q. So you only worked a couple of days on the phosphate soda?

A. Yes.

Q. No more than a couple of days?

A. A couple of days, and when we have so much liquid, we stop the Dorr plant and then we send a man over there. [fol. 118] During the whole time that you worked in the phosphate department from, as you say, May or April, 1932, until you stopped working in October or November, 1933, you only worked for two days with phosphate or soda?

Mr. Turtur: I object to that on the ground that it has already been answered, in that he first stated that he used to work three days outside and two days inside in the phosphate soda department.

Mr. Rudner: This is cross-examination, and I am interrogating this witness with respect to the facts of his employment.

Mr. Turtur: I object on the ground that while it may be cross-examination, it cannot be repeated from the standpoint of repetitious questions where the answer has already been elicited on cross-examination.

The Witness: I worked two days.

By Mr. Rudner:

Q. Two days a week you worked?

A. Yes.

Q. Is that right?

A. When the Dorr plant stopped, I wasn't working on the Dorr plant those two days, I worked on the phosphate [fol. 119] soda.

Q. What were you doing on the phosphate soda?

A. That phosphate soda get hard, and we break that and put it into another barrel or another tank. That is what we do waiting for orders, what they had ordered.

Q. When you started working on this soda, was it hard lumps?

A. Yes, all bags is hard, and we have to break them.

Q. You had to break it up?

A. Yes.

Q. What did you use to break it up?

A. We had a big wooden hammer.

Q. And after you broke it up what did you do with it?

A. Put it on screen and break it with little hammer in those small pieces and then fill them in the barrels or bags.

Q. That was all finished then?

A. Yes.

Q. So when you worked at it, then it was all finished and ready to ship out?

A. Yes.

Q. When Mr. Turtur was talking to you, you said that you did not get sick in the phosphate department?

A. I got sick in that silicate department; I was sick man in the phosphate.

Q. But you got sick in the silicate department? Where did you get sick?

A. I got sick first time in the silicate department, and [fol. 120] in the phosphate I got my wrist turned out, and I got the hernia in the phosphate.

Q. When did you first notice your hernia?

A. When the doctor make examination he find two rings.

Q. When was that?

A. That was in 1933 about in October, middle of October.

Q. When?

A. 1933.

Q. Did you know anything about the rings before 1933?

A. No, because my skin was very itchy and swelled up, and it was sore, but I don't feel that so bad.

Q. While you were working in the furnace room in the silicate department, your complaint was about the itch, is that right?

A. I had itch when I was working in phosphate.

Q. That is when it was hot?

A. Hot.

Q. And the itch started while you were working in the silicate department?

A. It started in the silicate department, yes.

Q. And it lasted while you worked in the phosphate department?

A. Yes, it lasted me to 1935. When I left the job they put me on the skin doctor.

Q. The itch was bad when it was hot?

A. Badder when it gets hot, it is worse.

Q. When it was cool, it was not so bad?

A. It was bad, but not like when it was hot.

[fol. 121] Q. After you got to the phosphate department you worked a certain number of days on the outside on the rocks and a certain number of days in the inside, as you say, on this phosphate of soda, is that right?

A. Yes.

Q. When you worked on the phosphate of soda, was it always on these large pieces of phosphate which you broke up?

A. No.

Q. What did you do?

A. I was working on the Dorr plant for operator, and when the Dorr plant stopped, then we worked breaking those pieces.

Q. How often would that be?

A. I was only breaking about three or four times the whole time I was working there.

Q. I thought you said that before. So that during the whole time you worked in the phosphate department, you worked only three or four days on the phosphate of soda?

A. Yes, and I was working on the dry soda sometimes.

Q. What is the dry soda?

A. That is the same soda but a little bit lighter.

Q. How often would you work on that?

A. When the Dorr plant was stopped; I could not tell you how much. When our job was not going, then we worked on those.

Q. How many days did you work on the dry soda?

[fol. 122] A. I don't know.

Q. What would you do when you worked in the Dorr plant?

A. I had a mill, and we grind that rock and put it in the tank with the sulphuric acid, and that settled down and like mud, and I pumped that out to another tank from tank to tank three times after it settled down like mud and then pumped that on a press and get it dry, and that fall down from the press and get it out in the chute.

Q. That grinding was all wet, too? That was a wet operation?

A. That was only like half-way wet.

Q. How often would you do that in the Dorr plant?

A. Two days a week.

Q. That was every week?

A. Yes.

Q. What do you have to say with regard to the dust while you were working in the phosphate department?

A. There is dust there.

Q. Where?

A. Right in the Dorr plant and around from the side they mix, they take liquids from us and they take soda ash and put it in that liquid and mix it, and that is right on our side, the same high like we are, and everything comes down in the chute, and it is mixed.

Q. It comes down the chute and goes into what?

[fol. 123] A. It is a little tank mixer.

Q. What is in the tank?

A. Liquid or water what we make, and they mix that soda ash in there and pump it out.

Q. There is not much dust there, is there?

A. There is enough dust.

Q. What do you mean by enough?

A. There is a lot of dust.

Q. Was there dust there like there was in the silicate department?

A. Sure.

Q. What do you mean by sure?

A. Yes,

Q. What do you mean by that?

A. There is a lot of dust in there, too.

Q. What becomes of the dust?

A. Well, it goes out the window because the Dorr plant is like this and it goes out the window and on the tanks and in the tanks.

Q. Are there windows in the room?

A. Yes.

Q. Are they open?

A. Open.

Q. All the windows open?

A. Sure.

Q. How many windows were there?

A. I don't know.

Q. Were there a lot of windows?

A. In the mill room where the mill is there is two mills, there is a lot of windows.

Q. Where you were working in any part of the phosphate department were there plenty of windows when you worked [fol. 124] inside?

A. Yes, there is enough windows.

Q. There were?

A. Yes, but in the bin——

Mr. Rudner: You have answered.

Mr. Turtur: Let him finish the answer.

Mr. Rudner: He has answered the question.

By Mr. Rudner:

Q. You got these samples all the same day?

A. Yes.

Q. Where did you take them? Did you take them home?

A. Yes, I took them home and put them in the cellar.

Q. When you took them home were they in the same form as they are now?

A. Same form, everything the same, same bottles.

Q. You kept them in the cellar how long?

A. From when I left the job I kept them until I gave it to my lawyer.

Q. Did you keep them in your cellar until the time you gave them to your lawyer?

A. Yes, I keep them in the cellar since that time, yes.

Q. Have any changes at all been made since you took them out of the plant? Did you see any changes?

A. No, I don't see any changes.

Q. Do you know the date that you gave them to your lawyer?

A. No, I don't remember the date.

Q. When did you first start coughing?

A. Around the last of 1931 or 1932 first I feel coughing.

[fol. 125] Q. Do you mean that you first started coughing the last part of 1931?

A. Or 1932.

Q. Or the early part of 1932?

A. Yes.

Q. That is while you were working in the silicate department?

A. Yes.

Q. Did you cough much?

A. I cough a little; it comes up more, all the time it comes up.

Q. Did you cough all through 1932?

A. All through 1932 and 1933, coughing all the time.

Q. All through 1932 and all through 1933?

A. Yes.

Q. And you are still coughing?

A. Still coughing.

Q. When did you find out for the first time that you could not eat?

A. 1932.

Q. Was that in 1932 that you were coughing and you could not eat?

A. Could not eat, and I started to lose my weight.

Q. In 1932?

A. Yes, got weaker.

Q. In 1932?

A. In 1932.

Q. That lasted all through 1932?

A. That is a long time.

Q. Did you — pains in 1932?

A. I got pains in my chest here——

Mr. Turtur: Indicating the right side of the chest.

[fol. 126] The Witness (continuing): And sometimes in the back, and sometimes it comes when I work at something or lift, it is a pain.

By Mr. Rudner:

Q. Did you have difficulty sleeping in 1932?

A. I didn't sleep from 1931 because the itch don't give me no sleep.

Q. What doctor operated on you for your hernia? Was it Doctor McCallion?

A. He lives near the Alexian Brother's Hospital; I don't know his name.

Q. In Elizabeth?

A. In Elizabeth.

Q. Who was your doctor?

A. For what?

Q. Hernia?

A. Yes, but I don't know his name.

Q. Was it McCallion?

A. Oh, sure McCallion.

Q. Doctor McCallion of Elizabeth, New Jersey?

A. Yes.

Q. After you left the hospital where you had your hernia operation, did this doctor treat you anymore? Did Doctor McCallion finish there?

A. He finish.

Mr. Rudner: That's all.

[fol. 127] Redirect examination.

By Mr. Turtur:

Q. What was the last thing that you did in 1933, in the latter part of November, while working for Grasselli?

Mr. Rudner: I object to that on the ground that it is in the direct examination.

Mr. Turtur: I press the question on the ground that on cross-examination it was brought out that he worked in the phosphate department, and when he was about to complete his answer "but in the bin" Mr. Rudner stated that there was no question pending and did not allow him to finish his answer. I am now probing to the question of what the witness wanted to say when he wanted to complete the answer.

Mr. Rudner: The witness had finished his answer and began a voluntary statement.

Mr. Turtur: That is not my recollection, and I press the question.

[fol. 128] By Mr. Turtur:

Q. Will you answer the question? Tell us everything.

A. I was working in the Dorr plant.

Q. What Dorr plant?

A. Phosphate soda Dorr plant.

Q. What did you do there?

A. Dumping rocks, and I was operator, that's all I can tell you.

Q. What did the operator do?

A. What did the operator do? Start the mills, grind up phosphate rock and then start the pumps pumping sulphuric acid in the mills, and that goes in the tank, and then it goes from one tank to another, and when it goes in the tanks, it will settle down, that mud and that rock will settle down, and we have to pump, and we have to push that mud on the pumps and we pump that mud from the tanks to tank four times before we get on the dryer.

Q. While you were doing this operation, was there any phosphate of soda dust there?

A. Sure, because there is beside us, right close beside us.

Q. Right close beside you?

A. Yes.

Q. What was close beside you?

A. Soda ash, they mix the soda.

Q. Referring to this soda ash and this phosphate work that you were doing, did that give off any dust?

A. Soda ash gives dust, and the rock give a little dust.

[fol. 129] Q. What rock?

A. Phosphate rock.

Q. Was there a lot of dust or a little dust?

A. A lot of dust. I would not say a little dust because if it was little dust, we don't have to sweep everyday three times.

Q. While you were doing this operation, did anybody tell you that this dust was dangerous or harmful to you?

A. No.

Q. Did you know that this dust was dangerous or harmful to you?

A. No.

Mr. Rudner: I object to that as not being redirect examination and entirely covered by the direct examination.

By Mr. Turtur:

Q. What did you mean when the question was asked of you about dust and windows in the phosphate department, and when you gave your answer, you were just about to say "But in the bin," and then you did not answer?

A. He asked me how many windows, and I said yes, but in the bin where the dry soda is, there is some windows you are not allowed to open because the dry soda will fly out, and the men have to work there when they take the dry soda for orders, and they have a belt in the cellar there, so that soda ash goes in the belt and that smokes.

[fol. 130] Q. What do you mean by smokes?

A. The dust, you have to break that.

Q. What did you mean when you said the dust and smoke?

A. The soda, dry soda, that dust comes up when you hit it.

Q. What did you mean when you used the word smoke? What did you mean by that?

A. That dust is like smoke.

Q. It is as heavy as smoke?

A. Yes, sure.

Q. You had to inhale that dust, is that so?

A. Sure, I have to.

Q. Was there anything to take out that dust from where you were working?

A. You ain't allowed to take that dust because——

Q. I didn't ask you that. I asked you if there was anything to take out that dust.

A. No, no.

Q. Where there any motor driven fans of any kind to take that out?

A. No.

Q. When these windows were open, did that take out all that dust?

A. From the bin, you ain't allowed to open windows in the bin.

Q. Did you work in the bin?

A. I was working four or five times in the bin.

Q. What do you mean by four or five times?

[fol. 131] Five days.

Q. Altogether five days?

A. In the bin, maybe more, all what I know straight five days.

Q. So that the last time that you were working for the Grasselli Chemical Company at the end of November, 1933, what was the chemical that you were working around?

A. Soda ash, and there is some caustic, too, but the caustic comes soda ash, and they mix with liquid and caustic.

Q. What liquid are you talking about? What is that?

A. Water and acid and some of that.

Q. Water and acid?

A. Yes.

Q. What kind of acid?

A. Sulphuric acid.

Q. Did that throw off any fumes, any smells?

A. Sure, you know what acid do.

Q. You said that there was soda ash and sulphuric acid and what else there?

A. What kind of soda they want.

Mr. Rudner: I object on the ground that that is not redirect examination, not being based upon any cross-examination.

Mr. Turtur: This is based upon cross-examination where he was not in contact with any of the chemicals, other than silicate way back in 1932, and it is also clarification of the [fol. 132] testimony.

The Witness: And that rock.

By Mr. Turtur:

Q. What rock?

A. They call it phosphate rock.

Q. Was there any of that phosphate powder there?

Q. They make the powder from that thing.

Q. In the department where you were working they also made the phosphate of soda powder?

A. Phosphate soda powder, duo powder, and all kinds.

Q. Were you working in that department?

A. Sure.

Q. What kind of powder?

A. All kinds of powder.

Q. Give us the name of the powder, if you can.

A. First they make the phosphate soda. That is all kinds I have there, and there is common dry soda, and then they make soda what they mix duo soda, and one soda I don't know how they call it, they use another rock.

Q. What kind of rock?

A. Stones, and they melt them and make liquid, I don't know what that is.

Q. Do I understand that you were in this department where they made the phosphate of soda?

A. Yes.

Q. And you worked in the bin?

A. Yes.

Q. And there was this soda ash there?

A. Yes.

[fol. 133] Q. And it was mixed with sulphuric acid?

A. All mixed with liquid with sulphuric acid.

Q. It was mixed with sulphuric acid, and also the phosphate and phosphate rock?

A. Yes.

Q. You were working in that department?

A. Yes.

Q. What was the last chemical that you came in contact with in November, 1933, when you said you worked there?

A. On the Dorr plant for operator and dumping rocks.

Q. What were the chemicals? Is that what you explained before?

A. Rocks.

Q. What kind of rocks?

A. Phosphate rocks and sulphuric acid mixed with water, and the rocks goes in there.

Q. What about this soda ash that you spoke about before?

A. Soda ash was on the side. It makes dust all the time. That ain't my job.

Q. But there was soda ash on the side, and that gave you the dust, too?

A. Yes.

Q. And you also came in contact with this phosphate of soda?

A. When this draft come over here from where they make that, it comes on us, and if it comes from this side, then the soda ash go on there.

Q. Referring to this chute that you spoke about to Mr. Rudner in furnace number three, you said it was low on cross-examination. You said it was low, and you had [fol. 134] to hit it with a hammer once in a while.

Mr. Rudner: He never said that to me.

By Mr. Turtur:

Q. (Continued.) When you hit this chute in the furnace number three—the chute that you spoke about to Mr. Rudner—was there a chute there at furnace number three?

A. The chute was hanging on the top and under the bottom we had the feeders for that stuff, and the stuff came down from the chute into the feeder and in the front, and then it is pushed in. Those chutes were too low because the first time we had a fire on the soda beside the chute, and that soda ash and sand get hot and it stops, and then we have to hit that with a hammer, and when we hit with a hammer, it comes out and that flies all over.

Q. What flies all over?

A. Soda ash and sand, so a lot of times the men that was up there had to run away from it, everybody run away, maybe Mr. High sometimes he was up there.

Q. Referring to these windows around where you were working, you spoke of high windows that you could never open. Why?

A. Because they are high.

Q. Were they always shut?

A. Yes.

[fol. 135] Q. When you broke up the phosphate rock with the hammer, did that cause any dust?

A. Phosphate of soda, not phosphate rock.

Q. Phosphate of soda?

A. Yes.

Q. You broke that with a hammer?

A. Yes.

Q. Did that give off any dust?

A. Yes, that gives dust but not so much. It gives a dust when you put it on the screen and when I break it. One man break it up, me or somebody else, and another man is on the screen and break everything into little pieces, and a lot of dust comes.

Q. A lot of dust?

A. Yes.

Q. When you were working in this phosphate department and also working with this sulphuric mixture and putting it on the belt after it dried out, did that give off any dust?

A. Do you mean that stuff from the tanks what we pump out and dry out?

Q. Yes.

A. That only gave you steam.

Q. In November, 1933, did you come in contact with any silicate dust at all while working for the Grasselli Chemical Company?

Mr. Rudner: I object to that as not redirect examination.

[fol. 136] Mr. Turtur: I press the question on the ground that it was brought out in cross-examination and quite a little made of it as to the last time of exposure as to silicate dust.

The Witness: Not the silicate dust, that is soda ash dust.

By Mr. Turtur:

Q. Soda ash dust and what else, if anything else?

A. Well, rock dust, soda ash, and rock dust.

Q. And that rock dust was what kind of rock?

A. Phosphate rock and another kind I don't know what is the name. There is two rocks there.

Q. On cross-examination you stated that there were a lot of windows in the phosphate department where you were working. Did all the dust that arose in that department and with which you were in contact, go out from the window or did it remain in the factory where you were working?

Mr. Rudner: I object to that as incompetent, irrelevant and immaterial.

Mr. Turtur: I press the question on the ground that it is very material.

[fol. 137] Mr. Rudner: I also object on the ground that it is not redirect examination.

The Witness: It settled down in the factory and some goes out.

By Mr. Turtur:

Q. It settled down in the factory?

A. Yes, and some goes out.

Q. As to the dust that settled down in the factory, was that a whole lot of dust or a little dust?

A. A whole lot of dust.

Q. Is that where you were working?

A. Sure, because I was working on the soda and in the mill, and it laid around on there since they mixed the soda ash, and they mix everything, and it comes out this way.

Q. Near where you were working?

A. Yes, because we were working higher.

Q. When you say this way, and you indicated that way towards you, you mean that this dust comes toward you?

A. Sure.

Q. Referring to this Doctor McCallion who operated on you, he was not your Doctor, was he? That was the hospital doctor, wasn't it?

A. That is the hospital doctor.

Q. You did not select him, did you?

A. No.

[fol. 138] Recross-examination.

By Mr. Rudner:

Q. What hospital was that?

A. Alexian Brother's Hospital.

Q. Who sent you there? Did you go alone?

A. I went myself.

Q. For the operation?
A. Yes.
Q. And the hospital picked this Doctor McCallion?
A. Yes.

Mr. Rudner: That is all.

[fol. 139] Stenographer's certificate to foregoing deposition omitted in printing.

[fol. 140] Commissioner's certificate to foregoing deposition omitted in printing.

[fol. 1] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title Omitted]

APPEARANCES:

Mario Turtur, Esq., for the plaintiff;
Katzenbach, Gildea & Rudner, Esqs., by Mr. Louis Rudner, for the defendant.

Tried before William Clark, Judge, and a jury at the Postoffice Building, Newark, New Jersey, on Tuesday, June 9, 1936, at 10:30 A. M.

[fol. 2] (A jury was duly empaneled and sworn.)

Mr. Turtur opened on behalf of the plaintiff as follows:

Gentlemen of the Jury—

MOTION THAT ISSUES AND PROOFS BE LIMITED

Mr. Rudner: If it please the Court, before Mr. Turtur opens, there is a short motion I should like to make at this time because the question will arise very shortly after the opening of the trial commences, and that is with respect to the pleadings. Your Honor will recall that the complaint has reference only to the silicate department of the defendant company's plant, without any reference to any other department. That is covered in several paragraphs of the complaint. Now this case was partly tried several weeks ago. Plaintiff sought to offer proofs with respect to the phosphate department. Your Honor at that time first ruled that the pleadings limited the proofs and circumstances, and that no proofs would be received outside of the silicate department. That was subsequently changed, and your Honor did allow the amendment to cover the phosphate department, not just the silicate department as mentioned in the complaint. Of course, we don't have the record in that case before us. We have to develop a new record. I respectfully move, and I have given notice to Mr. Turtur, to [fol. 3] ask that the issues and proofs in this case be limited entirely to the silicate department of the defendant company's plants. Now the complaint itself——

The Court: I am inclined to give the man a chance, and I wish counsel would reach a conclusion as to what their proofs will show. I want him to have a chance to show everything that he has. I don't want you to try to exaggerate.

Mr. Turtur: No, I won't exaggerate.

The Court: And make a case that does not exist.

Mr. Turtur: I don't propose to do that, your Honor please. We only propose to prove that which is definite and positive evidence in the case. The complaint, your Honor please, states in the first paragraph the plaintiff was in the employ of the defendant in the month of November, 1933, and for some time prior thereto at defendant's plant in Grasselli, County of Union and State of New Jersey.

The Court: Well, I am not so much interested in what it said before; what does it say now? What do you want it to say?

Mr. Turtur: We want it to show, your Honor please, and the depositions show, that the man was not only subjected [fol. 4] to the silicate dust in the silicate department, but that he was subjected to the soda ash referred to in the bills of particulars, and he was subjected to it not only in the silicate department, but also in the phosphate department. He worked not only in the silicate department, your Honor please, but he also worked in the phosphate department, and in that phosphate department he was subjected to the soda ash and to the phosphate of soda, and other injurious substances.

The Court: Has the Statute run?

Mr. Rudner: Yes, sir, that is the point.

Mr. Turtur: Will you let me finish?

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Mr. Rudner: I hadn't finished before. Your Honor may want to hear Mr. Turtur out of turn.

Mr. Turtur: I thought your Honor heard Mr. Rudner. Now if you wish to hear me I will continue.

The Court: Suit yourself.

Mr. Rudner: Your Honor, just in a few words, having regard to the complaint itself, the complaint alleges in very distinct language—If counsel will refer to the first paragraph—paragraph 4—"During the course of his employment in and around the said department"—having reference to the silicate department referred to in paragraph 2 [fol. 5] of the complaint, the words phosphate department do not appear in any way in the complaint itself. The words phosphate department do not appear anywhere whatsoever in the complaint.

The Court: Are you trying—I asked you several weeks ago—are you trying to widen your complaint?

Mr. Turtur: No, I am not.

The Court: Wait a minute, please—by including some language used in the bill of particulars; is that the theory?

Mr. Turtur: May I explain to the Court, please?

The Court: Certainly.

Mr. Turtur: Your Honor please, as I stated to the Court, this gentleman started to work in 1928 in the silicate department, and in that silicate department——

The Court: I am not asking you what the facts were. You filed a certain pleading.

Mr. Turtur: Yes, your Honor.

The Court: Now it may be that you didn't draw that pleading as widely as you should have.

Mr. Turtur: That is true, your Honor, for this reason, that Mr. Matey was in such condition from being so sick that it took me over three and one-half months to get a real [fol. 6] history from the man.

The Court: I am not criticizing you. It is not my place to criticize you, but the fact is you drew the pleadings in a certain way. Now are you trying to widen it?

Mr. Turtur: No, I am not, your Honor.

The Court: Are you trying to widen it by using words that are in the bill of particulars, because if you are, and if I were to permit an amendment which is barred by the statute, any recovery which your plaintiff might make would simply go up in smoke in the Court of Appeals, and you would not have done him any service whatever.

Mr. Turtur: I appreciate that, your Honor please. The complaint, I respectfully submit, is broad enough to cover any department and any place in which this plaintiff worked for this reason: "Plaintiff was in the employ of the defendant during the month of November, 1933, and for sometime prior thereto at defendant's plant at Grasselli." That is the first paragraph. That certainly is broad enough. Then paragraph 2——

The Court: Read the paragraph which accuses the company of negligence.

Mr. Turtur: I will be glad to, your Honor. Just the paragraph as to the negligence?

[fol. 7] The Court: Yes.

Mr. Turtur: The negligence of the defendant company consisted in this: (a) in failing to provide the plaintiff with a safe place to work; (b) in failing to provide the plaintiff with adequate and sufficient protection or appliances or safeguards in his said work; (c) in failing to provide the plaintiff with a proper ventilation system in the plant. Defendant had knowledge of the dangerous effect of inhaling and breathing in of any of the said substances before mentioned, and plaintiff was ignorant of their danger.

The Court: Is there any reference to the phosphate department?

Mr. Turtur: Yes, your Honor please.

The Court: Will you come to that?

Mr. Turtur: May I say this, your Honor please——

The Court: Will you come to that, please, Counsel?

Mr. Turtur: I say to your Honor that the evidence shows —Now, if he refers to paragraph 4——

The Court: Is there any reference in your complaint to phosphate?

Mr. Turtur: There is a reference in the bills of particu- [fol. 8] lars, and may I state this, that while he was working in the silicate department he was also subjected not only to silicate, but also to soda ash, and when he was transferred, as the depositions will show, and as you perhaps remember, your Honor, when he was transferred to the phosphate department, he was also subjected to soda ash and phosphate of soda and other things.

The Court: We will suspend now. I have some other matters to dispose of.

* * * * * * *

The Court: I didn't realize we were going to have a protracted argument.

Mr. Turtur: I didn't realize it either, your Honor. May I proceed, your Honor? I respectfully submit, your Honor, that the complaint is broad enough for me to include every chemical that this man was subjected to, and according to the cases, we are allowed to prove the last chemical he was subjected to at the last time that he was forced to inhale and breathe it in. Now the record specifically shows, your Honor please, when I asked him this question—"So that the last time you were working for the Grasselli——"

[fol. 9] The Court: I am not asking you, and I am not interested at the present moment in what the evidence shows. I am interested in trying to make you avoid committing legal error which will injure your client.

Mr. Turtur: I don't, your Honor please, expect to commit legal error, for this reason: As a result of the complaint, the defendant company through their counsel submitted bills of particulars.

The Court: If you have any cases which permit the widening of a complaint by a bill of particulars, I would like to see them.

Mr. Turtur: I do not have a case, sir, that it does permit the widening of the complaint, but I do have cases which state the following as to bills of particulars, that a bill of particulars requiring plaintiff to give the defendant information as to the scope of his claim—that is the case of Dixon vs. Swenson, 101 Law, page 22.

The Court: Will you read Mr. Turtur what I said?

(The reporter thereupon read the question of the Court.)

Mr. Turtur: I do not have your Honor any cases which widen the complaint, but I do state——

[fol. 10] The Court: Will you read counsel my question again, please?

(The reporter thereupon re-read the question of the Court.)

Mr. Turtur: My answer is no, sir.

The Court: How can you imperil your client by suggesting such a thing?

Mr. Turtur: I don't imperil my client, if your Honor please. If your Honor will permit me to state, the evidence will be according to the complaint——

The Court: Will you read counsel my question?

(The reporter re-read the Court's question.)

The Court: That is what you are asking to do.

Mr. Turtur: No, your Honor. I say that the evidence will show just exactly what the complaint sets up. I am sorry your Honor, please. My only answer to your question is no, there are no cases that I was able to find.

The Court: Nor is there any such law.

Mr. Turtur: I don't know of any.

The Court: And yet you wish to do it.

Mr. Turtur: I don't wish to do it, sir.

The Court: You understand, Counsel, don't you, that a pleading sets forth the cause of action?

[fol. 11] Mr. Turtur: That's right.

The Court. And that if the facts of the cause of action are not pleaded, the statute runs. For instance, you cannot tack an action for libel on to a complaint for negligence. Now that is what you are trying to do.

Mr. Turtur: Yes, your Honor please, but I am not trying to do that. I am trying to state to the Court, if you will please bear with me, I am trying to state to the Court to cover just exactly——

The Court: You broaden it by use of the bill of particulars, don't you?

Mr. Turtur: Yes, sir, and it was broadened by the use of the bill of particulars.

The Court: Then I asked you for some cases which permit such a broadening and you tell me there are none.

Mr. Turtur: Not that I was able to find.

The Court: **And there can be none.**

Mr. Turtur: No, sir. Now I say to your Honor, that in view of the fact of the first paragraph of my complaint, I respectfully submit that it is broad enough, sir, to cover all of the necessary things under the law, and also to cover the various departments where this man worked, for this reason: While it is true that there are no cases which will [fol. 12] or can broaden the complaint, it is true, nevertheless, that where the defendant submits a bill of particulars and he gets an answer to the bill of particulars which apprises him of the claim which is to be made at the trial, and if he does not move at the proper time to limit the scope thereof, then they might be right, but here is paragraph one of the complaint, which specifically and most positively states that the plaintiff was in the employ of the defendant in the month of November, 1933, and for sometime prior thereto at defendant's plant in Grasselli, County of Union and State of New Jersey. Now certainly the complaint to me indicates that he was working in the whole of the plant.

The Court: Suppose you want to add—"and there words were spoken which were slanderous to my client."

Mr. Turtur: That certainly would not be proper pleading.

The Court: Well, I deny the motion and you may have an exception.

Mr. Rudner: My motion was to limit the proof.

The Court: That will be granted.

Mr. Turtur: Then as I understand, we will not be able to mention the phosphate of soda, but merely the soda ash [fol. 13] and other chemicals?

The Court: That is correct.

Mr. Rudner: Counsel will not be able to mention the phosphate department?

Mr. Turtur: No, that isn't so, because in the phosphate department he was subjected to the same kind of chemicals that he was subjected to while he worked in the silicate department, and that was specifically stated that in the silicate department he was subjected to silicate and he was subjected to soda ash, and he continued being subjected to soda ash and a number of things, down to November, 1933.

Mr. Rudner: Your Honor has limited the proofs, as I understand, to the silicate department, as suggested in the complaint, and to no other department of the defendant company?

Mr. Turtur: No, your Honor please.

The Court: The motion is granted. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Cark. (Sealed.)

Mr. Turtur: I have my exception, your Honor please, but may I state, please, to the Court—this is very im- [fol. 14] portant please—I don't want to burden the Court, and I am saying it most respectfully, the silicate department——

(Further interruption at this point.)

Mr. Turtur: May I address the Court, your Honor please? The complaint——

The Court: We had, I thought, gone over this at great length. Have you more? Give me the complaint and I will read it again.

Mr. Rudner: Paragraph 2 and paragraph 4.

Mr. Turtur: How about paragraph one?

The Court: The complaint seems to be quite clear. You say he is employed in a certain department.

Mr. Turtur: How about paragraph one, your Honor? How do you construe that?

The Court: I construe paragraph one as limited by paragraph two. You may have an exception. Now it is limited.

Opening for Plaintiff

(Mr. Turtur resumed his opening as follows:)

May it please the Court and Gentlemen of the Jury: This is a case where George Matey is the plaintiff, and the Grasselli Chemical Company, a corporation of the State of Delaware, duly authorized to transact business in the State of New Jersey, is the defendant.

[fol. 15] The Court: I want a short opening, please, from both counsel.

Mr. Turtur: And we will show you that in the year 1928, Mr. Matey, in perfect health, went to work for the Grasselli Chemical Company, and he went to work as a so-called furnace man, and while working there for approximately a year and a half or two, nothing happened to him, but sometime in the year 1930 and 1931, he became sick, and he started to cough, and he started to get a skin rash, all of which we will prove to you was due to the negligence of the company in not providing the plaintiff with the necessary appliances of a respirator or any other form of appliance to safeguard and protect the health of the workmen. We will show you further, gentlemen of the jury, that there was an improper ventilation system. We will show you further that there were no ventilators of any sort other than windows, some of which were closed and some of which were open. We will show you further that while he was working around these chemicals, the dust was so heavy, this chemical dust was so heavy that it was almost as dense as smoke, and he was subjected to this type of working condition. We will show you further that at no time did he ever know that he was subjected to any dangerous or ob- [fol. 16] noxious odors or fumes, that he ever knew they were dangerous to him or to his health. We will show you further that the defendant company failed to provide the plaintiff with a safe place to work, and also failed to provide the plaintiff with an adequate and safe protection or appliances, or safeguards in his work, and also in failing to provide a proper ventilation system in the plant. As I have said, we will further show you that the defendant had knowledge of the dangerous effect of the inhalation and breathing in of aforesaid substances, and plaintiff was ignorant of the danger. Now as a result of the negligence of the defendant company, gentlemen of the jury, the plaintiff was so sick that in November, 1933, while subjected to fumes of certain chemicals which will be proven to you and prior thereto over a period of years, he would get a skin rash, so much so it was oozing out from underneath his arm pits and other places, and that he developed a cough, and this cough became worse and worse with the result that when the company's doctor, as we will prove to you, sometime in October of 1933, or the early part of November, 1933, a doctor that came from Delaware, examined him and told him to be careful of this cough, and of this hernia, be- [fol. 17] cause the cough became worse and worse, and the inguinal rings of the hernia finally were weakened. We will show you that in 1933, when this doctor examined him, he said something about telling Mr. Matey that he was crazy if he thought any of these chemicals had anything to do with it. About that time, about Thanksgiving of 1933, the plaintiff became so sick and so incapacitated that he could not continue with his work. Now we will show you that in November of 1933, when all this itching and all this other stuff was all over his body, the defendant company called in one of their own doctors to take care of this skin condition, and we will show you that all the time he complained about this cough and his general loss of sleep, loss of weight, general debility, inability to do work, and at no time did they ever do anything for him, but just took care of the skin condition and paid no attention to the other things.

We will show you that the appliances of the company were absolutely defective. We will show you that they didn't have a proper ventilation system; we will show you that several bosses promised and agreed to right this condition of the dust, but at no time did they ever tell him that he was in such shape, with the result, gentlemen of the jury, that in November, 1933, when he became so incapacitated [fol. 18] because of these chemical fumes, he went home, and as I said from November, 1933, down to approximately February of 1934, they kept this plaintiff under the care of a skin specialist; then they wouldn't give him any more work—I will correct that statement—they would not rehire him in February of 1934, and told him that the chemicals were bad for him and that he had better come back some other time in the winter. That from then on he was totally incapacitated, so much so that down to the present time the man has a lung abscess of a large size, and is in bed, and we will prove to you that he is just skin and bones.

Now, gentlemen of the jury, we were not in a position to bring the gentleman here in court, because he would have had to be brought here on a stretcher. So the result was that on a proper application to the court, his Honor, Judge Clark, issued an order that depositions be taken at the bedside of this man, so as not to bring him into court on a stretcher. We will show you that he has such a foul and putrid odor, that down to the present time, since when was it that he was operated on—July, 1934, wasn't it, at the hospital?

Mr. Rudner: His operation? Yes, I think so.

Mr. Turtur: We will show you gentlemen of the jury [fol. 19] that in July of 1934, about when he had this hernia operation, he went in there with a cough, and with this general run-down condition, and that he stayed in the hospital for seventeen days, and then three days after he went home. While sitting outside, trying to cure himself, he felt something coming up, as he said, which was sputum filled with pus, and that since that time he has been spitting out this sputum and this pus, and all these other things that the doctors will probably tell you of, and giving off approximately one pint or more of this per day. He is totally incapacitated, unable to be brought here, and we say that the condition from which he is suffering today is due entirely to the negligence of the defendant company and to no one else, and if we prove that to you, gentlemen of the jury, we are going to ask you that you render a substantial verdict for this man, as we will prove to you by proper medical testimony and proper legal evidence that the man is incapacitated, and may live for just a short while, and we say that the condition which he is suffering from is due entirely to the negligence of the defendant company.

Opening for Defendant

(Mr. Rudner opened on behalf of the defendant as follows:)

[fol. 20] May it please your Honor and gentlemen of the jury: Mr. Matey was employed in the silicate of soda department of the Grasselli Chemical Company for a period of time, and in that department was manufactured what is called silicate glass, the final product of glass, a hard substance made up of a combination of silica, sand and soda ash. We contend in this case, gentlemen, the combination of these products which this man was working with—and I might say he was a furnace man in this particular department, operating a furnace—and the product all comes through enclosed pipes,—you don't see the product at all,—it comes through enclosed pipes, and is mechanically operated in a furnace where it is molten and poured out as molten glass, silicate glass, and finally as hard putty,—none of these things at which this man worked in the furnace room were in any respect dangerous or harmful to Mr. Matey or other employes. We say there were ample ventilators, plenty of ventilators. We say there was no such dust condition as suggested by counsel's opening. We deny there was any such dust situation. We all know this, gentlemen, in the course of human experience, wherever we are there is a little dust, and there was a little dust in this plant, but a very small amount of dust, with ample ventilation in [fol. 21] the form of windows, and other things, which are about the plant. We deny negligence in any respect whatsoever. We say that this company fulfilled all the obligations imposed by law with respect to this man. This plant was periodically inspected—this particular room was periodically inspected by the Labor Department of the State of New Jersey. I am going to bring into court inspectors of the Labor Department, who inspected the department, found the ventilation adequate, made no recommendations, but always favorable reports were made with respect to the plant by the Labor Department of the State of New Jersey. We deny negligence in any respect whatsoever. We say to you gentlemen that the room contained no harmful dust, contained no dangerous dust; contains nothing of a dangerous nature to affect this man. Now apparently Mr. Matey is sick,—Mr. Turtur has said with an abscess on his lung. We say to you gentlemen, whatever condition Mr. Matey does have is not in any wise attributable to his occupation with the Grasselli Chemical plant, or anything which happened at the plant itself. Any condition which came about to him might have come about to Mr. Matey had he worked on the outside, or had he worked in an office, as I do. It is just a circumstance that he worked in the Grasselli Chemi- [fol. 22] cal Company's plant, with no connection with the present condition of health of Mr. Matey. We have several defenses, set forth in detail in our answer, I will not go into in detail. It is a matter for you and the Court to pass upon later. We deny, of course, all charges of negligence. We say whatever illness he is now suffering from resulted from a risk assumed by the plaintiff and by all employes. We have other defenses, including the one that the action is barred by the Statute of Limitations of the State of New Jersey. Such other defenses as are mentioned in our answer are matters of law to be passed upon by you gentlemen and by the Court. We deny that under the circumstances of this case, the plaintiff is entitled to any recovery whatever, and we deny any charge of negligence growing out of the facts which I have mentioned.

Motion as to Inspection of Plant, etc.

Mr. Turtur: May it please the Court, at this time I make a motion that your Honor permit the jury to inspect the plant of the defendant company, as I understand from counsel that the physical condition of the plant has not in any wise been changed, so that the jury will know exactly the appliances that were used, and so that the jury may examine the specific premises where this gentleman worked.

[fol. 23] The Court: Do you want them to go now?

Mr. Turtur: Whatever your Honor may say.

The Court: All right.

Mr. Turtur: And I further would like to make a motion that your Honor permit the jury to interview. Mr. George Matey at his home, so that they will see the condition of this gentleman.

The Court: Any opposition?

Mr. Rudner: If your Honor please, I suppose there are going to be doctors here who will testify to this man's condition. I suppose they can give as strong a picture as anybody can give. I didn't know how your Honor ruled on the first motion.

The Court: I think they can view the premises.

Mr. Rudner: Suppose we leave that matter for the time being. We have photographs here and an excellent chart which I have drawn.

The Court: They had better go and see it, I think.

Mr. Turtur: And may I ask, your Honor please, from Mr. Rudner now, whether the plant is in operation?

Mr. Rudner: It is.

Mr. Turtur: In full?

Mr. Rudner: Yes.

[fol. 24] The Court: I personally think it would be a mistake to subject either your plaintiff or the jury to a rather painful examination, but you may do as you wish.

Mr. Turtur: Well, I thought, your Honor please, the jury might see for themselves the condition of this gentleman. He lives near the plant itself, and while they are making the inspection of the plant, they might just look at George Matey and see for themselves what his condition is. They don't have to talk to him, but they may observe him, and I think it will help not only the jury, but help the Court in arriving at whatever decision——

Mr. Rudner: I might say, your Honor, I think the testimony will present to the jury quite adequately facts with respect to the plant and its operation.

The Court: Well, as I understand, Mr. Turtur, nobody questions the fact that the man is seriously ill. The only question in dispute is, first, whether his illness was caused by the defendant, and secondly, whether it was negligently so caused. No one will dispute that he is seriously, or even desperately ill, will you?

Mr. Rudner: The man is certainly a sick man.

Mr. Turtur: Except that he has a right constitutionally [fol. 25] and legally and otherwise to be observed by the jury.

The Court: I don't seem to make such progress—I say no one questions that he is desperately ill and probably has not long to live, but I don't think he should be subjected to the ordeal of having himself inspected like a guinea pig. I will charge the jury that he is desperately ill and that he has not long to live.

Mr. Rudner: The man is very sick.

The Court: Don't minimize it. He is desperately ill. The Clerk asks who will pay the expenses of taking the jury to the plant.

We will let the costs abide the event.

Mr. Rudner: May I suggest this: I suggest we go forward with the proofs——

The Court: No, I think they ought to see it first. They will be back by two o'clock, three o'clock, anyway.

Mr. Turtur: Now, how does your Honor want this inspection? May counsel accompany this jury?

The Court: I don't want any quarreling. I am going to send the Clerk, and I don't want any discussion on the part [fol. 26] of counsel, or any quarreling between counsel.

Mr. Rudner: I don't think there will be any discussion at the plant.

Mr. Turtur: May we point out the various places that we contend——

The Court: No, you may not. Neither defendant or you are to utter one word at that plant. If you do I will declare a mistrial.

Mr. Rudner: That is only the silicate department of the plant.

Mr. Turtur: Yes, but your Honor gave an order——

The Court: The jury can make a thorough inspection of that plant, and see for themselves what it is like.

Mr. Turtur: Now, your Honor please, your Honor issued an order in this court permitting the plaintiff to make an inspection of whatever place or places the plaintiff worked.

The Court: Mr. Turtur, I really can't have so much quarreling.

Mr. Turtur: Your Honor please, I don't mean to quarrel with you. I am very respectful, and I want to be very respectful with due deference to the Court.

The Court: I said that the jury can go and inspect the [fol. 27] silicate department. They are intelligent men. They can retain in their minds the physical impression that that department makes upon them. I suppose the

Clerk can inquire which the silicate department is, and he can see that the jury have the run of the silicate department.

Mr. Turtur: All right. Now your Honor's order stated whatever place or places the plaintiff worked. Now he worked also outside of the plant, and he also worked in this other department where he was subjected to the same kind of chemical that he was in the silicate department.

The Court: Which I have already ruled out, counsel, as you well know.

Mr. Turtur: Then your order, your Honor, please, covers the broad scope of whatever place or places he worked, and your Honor——

The Court: You are to confine the proof to the silicate department. That is the part of the plant the jury will inspect and no other.

Mr. Turtur: There will be a court attendant there with the jury?

The Court: Mr. Jaeckel.

The Clerk: And I will have the Marshal with me.

Mr. Rudner: Counsel and none of us to make a single [fol. 28] statement whatsoever to the jury. They are free to go in the silicate department, wherever they choose to go.

The Court: I will permit the jury to ask questions of the employes as to the operation of the plant.

Mr. Turtur: Your Honor please, I think with deference to the jury they ought to be informed which is No. 1 furnace, which is No. 2 furnace, and which is No. 3, as will develop in the trial, so that they will know which particular furnaces——

Mr. Rudner: No. 3 is the only furnace in operation, and the only one which has been in operation for several years. No. 1 is the furthest away from No. 3, and No. 2 is the furnace right next to No. 3 furnace. I don't think that this means anything just now, your Honor please, but I don't think it will do any harm to just say this is No. 1 furnace, No. 2 furnace and No. 3 furnace.

The Court: Three o'clock. I don't want to hurry you, and I want you to have your lunch, too. No one except the two counsel, neither your representative, nor Mr. Rudner's representative.

Mr. Turtur: Nor any of his assistants.

The Court: No.

(Recess.)

[fol. 29] Afternoon Session—3:00 P. M.

The Court: I think it will be better, gentlemen—I have a hearing on a reorganization proceeding—it is pretty late now—maybe you have had quite a strenuous time, I don't know, you look all right—I think we had better adjourn until tomorrow morning at 10:30, if that is agreeable.

Is there anything to report, Mr. Jaeckel?

The Clerk: I have questions and answers which I will have typed up tonight.

The Court: Is there any dispute about it?

The Clerk: No.

Mr. Turtur: Your Honor, may I ask that you be so kind, if possible, to permit Mr. Pierce, who is the employment manager of the Raritan Copper Works, to answer just a few questions as to his former employment?

The Court: Who is he?

Mr. Turtur: He is a man where Mr. Matey worked prior to going to Grasselli. He is a very short witness.

The Court: All right. Call him.

[fol. 30] Nathaniel W. Pierce, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Mr. Pierce, by whom are you employed?

A. Raritan Copper Works, Perth Amboy.

Q. And in what department?

A. Director of Safety & Welfare.

Q. And for how long have you been so employed?

A. Some 36 years.

Q. So that you were there prior to 1928?

A. I was.

Q. And did you at my request make an examination of the records of your plant regarding the employment record of George Matey?

A. I did.

Q. Would you please refer to the record and advise the Court and jury, please, as to how long Mr. Matey worked there?

A. Our record shows that he was employed October 15, 1923 to May 31, 1928.

Q. Did he work there prior to that date, Mr. Pierce?

A. I have no record of his employment.

Q. And during all the time that he worked there, Mr. Pierce, and according to the record, did he work there steadily?

[fol. 31] A. Yes.

Q. And was he ever subjected to any dust of any kind in your plant in the place which he was working in?

A. Subjected to what?

Q. Any chemical dusts of any kind?

A. No, none whatever.

Q. Did he ever complain of any pains, aches or ills during the time that he worked there with you?

A. Not to my knowledge.

Q. And in your opinion, sir, was he in good health at the time he was working there?

Mr. Rudner: Now, if this witness knows—this witness is a director of safety, and I think the questions being propounded would necessarily go beyond the scope of Mr. Pierce's information.

The Court: He won't answer something he doesn't know about.

Q. Do you have any record of illness of Mr. Matey while employed in the company?

A. We have no record of any illness.

Q. You know Mr. Matey?

A. Well, I don't know that I could identify him.

Q. Your record shows that he worked steadily?

A. Yes.

Q. No record of any illness?

A. No.

[fol. 32] Q. No admission to your hospital while there?

A. Not for sickness.

Q. What was he admitted for?

A. I have a record of two treatments at the emergency hospital of the plant. One on June 5, 1927, burns, second degree, left side neck and back; and on June 7, 1927, abrasion of the back of right hand.

Q. Did he keep on working?

A. Yes, no time lost.

Q. No time off?

A. No.

Q. That is all.

Cross-examination.

By Mr. Rudner:

Q. Mr. Pierce, you testified with respect to the period of October, 1923, to May, 1928.

A. Yes.

Q. That Mr. Matey was employed by the Raritan Copper Works. He was also employed for sometime prior to October, 1923, was he not?

A. Well, I believe so. I cannot testify from the records. I haven't the records to show it.

Q. Your records don't go beyond 1923?

A. No.

Q. He might have very well been employed there without your records showing it?

[fol. 33] A. I believe that was the case.

Q. According to your best information and belief was he actually employed by the Raritan Copper Company for some period of years prior to 1923?

A. Well, I have no personal knowledge that he was.

Q. While Mr. Matey was working at the Raritan Copper Works, with what materials was he working; what was he doing?

A. Why, his occupation was that of night furnace man.

Q. And working on a furnace?

A. Yes.

Q. And what was being molten in the furnace?

A. Copper.

Q. Was that the product he worked in the whole time he worked for the Raritan Copper Works?

A. Yes.

Redirect examination.

By Mr. Turtur:

Q. That did not leave out any chemical dust of any kind, did it, in the occupation?

A. No.

Recross-examination.

By Mr. Rudner:

Q. There was heat there, however, was there not?

A. Heat, yes.

Mr. Turtur: No further questions.

[fol. 34] **COLLOQUY**

The Court: The jury requested me to say through the Clerk that they took up some dust and would like to have it analyzed by an impartial chemist.

Mr. Rudner: I think Mr. Turtur made some mention about the plant, that Mr. Turtur has his chemist who will pass upon it. There is some of the powder in evidence that was worked on in this particular plant. This is powder that was taken from one of the raised——

The Court: Just today?

Mr. Rudner: We will both submit analyses.

The Court: Well, the jury want an impartial one, they want an independent one.

Mr. Turtur: I have no objection to that, your Honor.

Mr. Rudner: I suppose on the ingredients of the powder there is going to be no dispute, I don't know.

The Court: Well, they want it anyway. Do you have any objection to their having it?

Mr. Rudner: Oh, no.

Mr. Turtur: I have it marked. This was taken from the upper level mix room.

Mr. Rudner: There will be chemists who will analyze it.

[fol. 35] Mr. Turtur has one or more chemists.

The Court: The jury want an impartial chemist.

Mr. Rudner: That's all right.

The Court: Dr. Wiener.

(At this point an adjournment was taken to Wednesday, June 10, 1936, at 10:30 A. M.)

[fol. 36] Wednesday, June 10, 1936,
10:30 A. M,

Case continued.

Appearances as before.

Mr. Rudner: Your Honor has limited the proofs in this case to the silicate department by rulings of yesterday. Now I think it well to present these facts to your Honor, so that we can save the time of your Honor, and the jury and everyone else. I think that counsel admits that this man ceased his employment in the silicate department for all purposes, and never went back, either in the Fall of 1932, or the very early Spring of 1933, at the very latest. The suit in this case, at least the summons, is tested as of October 1, 1935. The accident will be definitely barred by the Statute of Limitations. I don't think there is any question about that time, is there, Mr. Turtur? I mean we could take proof for a couple of days, the result would be the same.

The Court: Well, I think, of course, the fellow ought to have his day in court.

Mr. Rudner: Your Honor would prefer to take the proofs? I just present this. You get the dates that I have reference to?

[fol. 37] Mr. Turtur: May I speak, your Honor?

The Court: Yes, certainly.

Mr. Turtur: Your Honor please, at the time the depositions were taken at Mr. Matey's house, there was no objection by Mr. Rudner as to the time that he worked in the other departments, and I think that the objection now comes too late, but in order that this matter may get to the jury and dispose of this case on its merits, I would like to amend my complaint.

The Court: Of course, I don't see—the trouble is—I mean you blame your client for that, and say you couldn't make out where he worked. I don't understand how that could be exactly.

Mr. Turtur: The reason for it, your Honor, he was very ill, and I had to keep going there to get a definite and positive history from him, and as soon as he retained me he told me that it was in the silicate department, and I didn't know of anything in the phosphate department until months afterwards. Because of the condition of the man he couldn't properly think, he couldn't properly speak. Now the leading case in the State, if your Honor please, as to the amendment of a complaint——

[fol. 38] The Court: I would like not to have him faced with the Statute of Limitations.

Mr. Rudner: Well, we have to set up the defense. The defense is generally recognized when it is there.

The Court: No, but in these cases where the injured party —it is not like if I get hit by an automobile; I know I am hurt, and if I don't bring the action in the necessary time that is my fault. I don't blame anybody for pleading the Statute, but in these gradual exposure cases I think it is a very unsocial performance to plead the Statute. I thought it was in the radium cases, I think it is in any case.

Mr. Rudner: Your Honor, it is a legal situation which is presented in our answer.

The Court: For that reason I would make every effort to try to get him past the Statute, but of course, if legally speaking, it cannot be upheld in the Court of Appeals—I think I will excuse the jury a minute.

(The jury was excused at this point.)

The Court: The trouble is of course, Mr. Turtur—I don't know who is to blame for it, but here you have permitted a legal situation to grow up which this company seems to [fol. 39] think it wise for them to take advantage of. They don't earn my commendation or any one else's but nevertheless they have a right to do it, and I cannot prevent them.

Mr. Rudner: In the radium cases that matter was definitely presented. Of course, Judge Forman had an equity proceeding, but it is there——

The Court: Well, I say, I have said quite publicly what I think of the radium company for their performance. I think every one else thought so, too.

Mr. Rudner: Well, Judge Clark, I suppose it depends on circumstances.

The Court: After all, people are ignorant, and the radium company didn't make any attempt to warn them, maybe because they didn't know that they should warn them. Nevertheless, they were injured and they did die..

Mr. Rudner: There is nothing dangerous about this.

The Court: Now the jury reported to the Clerk and the Clerk reported to me that the conditions at your plant were shocking—Now, just a minute, Mr. Rudner; and in the case, the other silicosis case I had, the company had taken a lot of precautions. They had these fans, and these suction fans, they had everything. So in the Circuit Court of Appeals [fol. 40] reversal of me there was that substantial justice that they did take a lot of precautions, and the precautions were not effective, I though-, but they did take precautions. Now as I understand it, your company hasn't taken any.

Mr. Rudner: We have windows there, and the matter of experience is very favorable, your Honor. There has never been any injury in this plant.

The Court: Well, this fellow did get pretty sick, didn't he?

Mr. Geuther: Judge Clark, I might say this. First of all, I don't want to be characterized by your Honor's feeling as to the company's action in this matter. I am acting merely as counsel as Mr. Rudner is.

The Court: I don't know, maybe your company is one of those companies which have very curious views of social policies.

Mr. Geuther: I will say in the radium cases the cause and the condition were frankly admitted.

The Court: Originally they tried to say that they had syphillis, and everything else. I was the person who convinced them; at least, Dr. Martland and I were the ones who convinced them that they were suffering from radium poisoning. Everybody admits it now, but they didn't admit it at first.

[fol. 41] Mr. Geuther: I think your judgment has been proven since.

The Court: Three of the five girls are dead.

Mr. Geuther: But in this case there is not only a very honest and substantial question of doubt, but we feel definitely that this man's condition is not due to that.

The Court: But you are not trying to set that up now. You are trying to prevent the jury considering that.

Mr. Geuther: But we feel that as Mr. Rudner says, there is a legal question there.

The Court: All right. Then you are taking advantage of the technicality.

Mr. Rudner: Strictly, that is so, but the law is there and we didn't make it. It is there for a definite reason.

Mr. Turtur: On the question of taking advantage of the technicality, if I may with due deference, Judge Ackerson——

The Court: What's this, in the Court of Appeals?

Mr. Turtur: This was affirmed in the Court of Appeals verbatim, your Honor, in the case of O'Shaugnessy vs. the Bayonne News Company. On the subject of amendment [fol. 42] affirmed verbatim by the Court of Errors and Appeals in 109 New Jersey Law, page 271, and I have some more citations.

The Court: Have you any law, Mr. Rudner?

Mr. Rudner: Yes.

The Court: Let me see your cases.

Mr. Rudner: Here is a statement by Judge Wells, Court of Errors and Appeals, 111 Law, Allen vs. Spring Street Realty Company.

(Reading from the case.)

The Court: Neither of these cases is anything but generalities.

(Mr. Rudner cites also the case of Casavela, 12 New Jersey Miscellaneous, 81, affirmed 113 New Jersey Law, 328, reading from the case.)

The Court: Let me see the complaint.
Mr. Rudner: If you take the complaint——
The Court: That is just what I am taking.
Mr. Turtur: I have some more law, your Honor please.
The Court: You see the unfortunate fact is that what really caused the first injury, if anything did, is this silicate, and because you say he didn't tell you that, or you didn't think about the Statute of Limitations——
Mr. Rudner: Of course, if your Honor please——
[fol. 43] The Court: You are trying to make it appear that what caused the injury is the phosphate.
Mr. Turtur: No, your Honor please.
The Court: That is the sad fact.
Mr. Turtur: In the silicate department, your Honor please, he always worked with this soda ash. The soda ash that the jury was exposed to yesterday was the same soda ash that he was exposed to, not only in the silicate department, but also where they sent him to work outside and two days inside, and the test is what was his last exposure, and the testimony will definitely show that the last exposure was not only the phosphate of soda, but also the soda ash which he was exposed to in November of 1933, when he became incapacitated from work. Now, those cases, your Honor please, all of the line of cases——
The Court: You see I again say to you, your mistaken pleading has put a very difficult——
Mr. Turtur: I appreciate this, your Honor please.

Mr. Rudner: We gave this man warning that we were going to set this up in paragraph 2 of our answer: "Plaintiff was for a time employed as furnace man in the silicate [fol. 44] department of defendant's said plant. It denies that he was employed after November 1, 1932."

The Court: I didn't say you didn't give him warning. That wouldn't help him any. He is in the same position all the time.

Mr. Turtur: I say it is entirely discretionary with the Court where an injustice would be done.

The Court: You say that, but what's the use of getting a legal situation into the case that cannot be sustained?

Mr. Turtur: Here is why I think it can be sustained.

The Court: I have read that case. It is very general.

Mr. Turtur: No, your Honor please; may I refer you to some other cases? But the case of O'Shaugnessy against the Bayonne News, as I told your Honor, was affirmed by the Court of Errors and Appeals in 109 New Jersey Law, 271. Now further than that, may I give your Honor a further distinction in the complaint? I think that No. 1——

The Court: Please don't say that number one again, because that obviously cannot——

Mr. Turtur: All right; I will refer you to another matter [fol. 45] in the complaint, which is covered by Chief Justice Gummers in his day in another case, which I will give your Honor. This case, your Honor, went to the question of amendment after Statute of Limitations had expired,—De Faille vs. People's Gas Company, 6 Miscellaneous, 790. I refer your Honor to the statement on page 791 (reading). The amendment was allowed.

The Court: You mean about the continuing?

Mr. Turtur: Yes, your Honor, paragraph 7, wherein we say by reason of the negligence of the defendant, plaintiff suffered and underwent, and in the future will suffer and undergo—Chief Justice Gummere stated that the gravamen of the complaint——

The Court: Give me that complaint again. I wish you had properly pleaded it. Do you mean to say to me that your plaintiff was so inaccurate that you couldn't even determine what place he worked at in the month of November, 1933?

Mr. Turtur: On my word of honor.

The Court: Well, didn't you think of calling up the plant and asking where he worked?

Mr. Turtur: We did go to the plant and the information was refused to us. Mr. Blachman went to the plant and spoke to one of the assistant superintendents, and the in- [fol. 46] formation was refused to us.

The Court: And the man himself didn't even know where he was working?

Mr. Turtur: No, sir. He knew that he worked in the silicate department, but I didn't develop it until months afterwards when I talked to him, by reason of his physical condition, that he worked in this department.

The Court: Yes, but in November he didn't work in the silicate department at all.

Mr. Turtur: In November, 1933? No.

The Court: How did that get into the pleadings?

Mr. Turtur: He was exposed to the soda ash in November, 1933.

The Court: How does it get into the pleadings that you say that he worked in November, 1933, in the silicate department?

Mr. Turtur: He told me, your Honor please, that he worked in the silicate department at that time.

The Court: Give me his deposition. He didn't tell you that afterwards. He seems pretty able the day this deposition was taken, and he wasn't so able when you filed this complaint.

Mr. Turtur: No, your Honor please, because he is well [fol. 47] for a day or two, then gets into a position where he cannot even talk or breathe. That day that we were there he suffered tremendously thereafter, and he is on his deathbed now.

The Court: That is apparent, but in spite of the fact that he is on his deathbed, he seems to have been able to remember very clearly where he worked.

Mr. Turtur: Yes, just as I said to your Honor, at certain moments he does remember.

Mr. Rudner: His previous attorneys, Weltcheck and Weltchek, his attorneys of Elizabeth, had a lot of facts that they set forth.

Mr. Turtur: I don't know what that has to do with this case, except that the previous attorneys thought he had silicosis. There is no such claim as silicosis. Here on page 131, your Honor please—"Q. So that the last time that you were working for the Grasselli Chemical Company, at the end of November, 1933, what was the chemical that you were working around? A. Soda Ash."

The Court: Mr. Turtur, that is the whole point.

Mr. Turtur: Please!

The Court: You are mistaking the whole point.

Mr. Turtur: Your Honor please, I don't miss the point, and I am trying to make the point to your Honor that the [fol. 48] law has definitely stated it is the last exposure, and your Honor within your discretion, so as to prevent that an injustice will be done this man——

The Court: Well, it isn't that.

Mr. Turtur: —can amend the complaint.

The Court: That is not the point, Mr. Turtur. The point is there is no use in my flying in the face of the law. Your client isn't any better off if I do.

Mr. Turtur: Except this, your Honor please. This man, if I may make this clear, your Honor please, I am so sorry to trouble you so much because of the condition of this complaint—this man while working in this department, he was not subjected only to the silicate, but he was subjected also to the soda ash while he was working there.

The Court: You don't even use the words soda ash in your complaint.

Mr. Turtur: No, but they asked me, your Honor please, in their bill of particulars, and I advised them of the soda ash and of the phosphate of soda.

The Court: I have already said the law does not permit the widening of the complaint.

Mr. Turtur: That is true, but the law within the discre- [fol. 49] tion of your Honor's fairness, will permit the amendment, providing I am not broadening the scope of the complaint, and if the action is of the same gist and is of the same cause, then your Honor even after the Statute of Limitations has run, can permit an amendment.

The Court: Your cause of action is for exposure to silicate.

Mr. Turtur: No, ~~your~~ Honor, my cause of action is for exposure to silicate, to soda ash, and to phosphate of soda.

The Court: There is no such wording in your complaint.

Mr. Turtur: And in the silicate department, your Honor please, there was soda ash, silicate and soda ash.

The Court: There is no such statement in your complaint.

Mr. Turtur: But we cannot give evidence in a complaint. Here is the evidence in the testimony.

Mr. Rudner: Your Honor, this man wasn't so helpless but that he was able to tell counsel he was a furnace man and general worker in the silicate department.

The Court: What are you reading from there?

[fol. 50] Mr. Rudner: The complaint.

Mr. Turtur: No, that is the answer he has there.

Mr. Rudner: This is the complaint.

The Court: My notion is that counsel never thought of the Statute of Limitations at the time he filed the complaint.

Mr. Turtur: No, your Honor please, I did think of it, but this is information that I got from my client, and may I give your Honor some further cases, so as to permit your Honor within the legal rules to amend my complaint, because it is solely within your Honor's discretion, as I said, to prevent an injustice being done.

The Court: It is not within my discretion.

Mr. Turtur: Well, I am going to show you some cases if you will permit me to refer to them. I maintain that the case where Judge Ackerson——

The Court: It is not in point.

Mr. Turtur: Goes into a lengthy discussion of how amendments can be had, was affirmed by the Court of Errors and Appeals in the citation given you before in 109, New Jersey Law, 271, then this 6 Miscellaneous 790, sets up the distinction of an averment in the complaint to show the continuing suffering of the plaintiff, as in our case. It [fol. 51] says, "And in the future will suffer". This shows that if the complaint is amended, it will not set up a new cause of action within the meaning [illegible] Statute of Limitations. Now I refer your Honor to the case of Gill against Berger, 43 Law 430; also 62 Equity 75 (reading from the case), and this was brought, your Honor please, one month before.

The Court: We know that. Don't give me any law——

Mr. Rudner: May I say a word?

Mr. Turtur: Pardon me, I am speaking.

Mr. Rudner: I cannot get a word in edgewise.

Mr. Turtur: I refer now to the Pennsylvania case, Lehigh National Bank——

The Court: In the State of Pennsylvania?

Mr. Turtur: Yes.

The Court: I don't want any Pennsylvania cases.

Mr. Turtur: I take other jurisdictions, your Honor, to show you the trend of the legal thought throughout the country. May I refer your Honor to these cases? Then I have some Delaware cases.

Mr. Rudner: May I suggest just one thought, Mr. Turtur? Not only is Mr. Turtur asking for an amendment after the cause in any theory is barred, but he is asking an amend- [fol. 52] ment after the very cause set forth in the complaint is barred. In other words, this is a novel situation, in that the silicate department action is absolutely barred, was barred at the time the suit was started. Now in June, 1936, an amendment is asked after the action would have been barred under any theory. There is no case which can be presented which will justify that.

The Court: I don't understand that, Mr. Rudner.

Mr. Rudner: Pardon me?

The Court: I don't understand that last.

Mr. Rudner: I will tell you. If we deal with the silicate department, as disclosed in the complaint, having regard to the fact that this man worked at the very last in the silicate department in the late Fall of 1932, or the early Spring of 1933, that action as disclosed by the complaint is absolutely barred and was barred, not as of today alone, but on the day suit was started, because this suit was started October 1, 1935, and at that time any cause of action which he may have had with respect to the silicate department was absolutely and completely gone. Now today, in June, 1936, or two and a half years——

The Court: Get me that radium case, will you?

[fol. 53] Mr. Rudner: After the last employment in any part of the plant, amendment is asked. It just can't be done. There is no law to sustain it, and all of the law is against it.

Mr. Turtur: If the case was one, your Honor please, where we were re-stating a new cause of action, Mr. Rudner would be right, but we are not stating a new cause of action, because it refers as of the time the complaint was filed. The New Jersey case of Duff vs. McKenna, 81 Atlantic——

The Court: Please don't read any more law from yellow sheets of paper.

Mr. Rudner: Here is the opinion of Judge Forman in the radium case.

The Court: I want the opinion.

Mr. Turtur: These are taken right out of the Digest, your Honor please, verbatim, so as to try and be of service to the Court as to the amendment.

The Court: You have an action here for injury due to silicate. You know just as well as I do that your phosphate is composed in some attempt to meet the Statute. I would suggest that probably as your man didn't know that he was injured, you could go into equity and restrain the operation of the Statute. It seems to me that is what you ought [fol. 54] to do, because here you are trying to give a false cause of action in order to avoid the Statute.

Mr. Turtur: That is not so, your Honor.

The Court: I mean false in the sense that it isn't so——

Mr. Turtur: That is not so, for the reason——

The Court: The man's injury, according to your doctor the other day, was due to this silicate.

Mr. Turtur: No, your Honor please, it was silicate plus soda ash, plus the phosphate of soda, and in the silicate department the soda ash is the thing that he was working with at this furnace No. 3, the very thing that the jury were subjected to yesterday, the very thing and the same thing that they are still using in the silicate department. Now if they were using it in the silicate department, the phosphate department, making it at this furnace, and still using the soda ash, and subjected to the soda ash in 1933, when he became disabled from work——

Mr. Rudner: In addition to which, in the phosphate department the conditions were obviously not those of negligence, it was out doors.

Mr. Turtur: No, it was understood, your Honor please —Here is the opinion of Dr. Gettler, your Honor please, where he specifically refers——

[fol. 55] The Court: We will get Dr. Gettler back to the stand.

Mr. Turtur: Yes, we will get Dr. Gettler back; I will be very happy.

Mr. Geuther: He said he suffered no harm in the phosphate department.

Mr. Turtur: That is not so, your Honor please, and I will refer positively and definitely to the testimony, Mr. Geuther.

The Court: You are trying to make a case to get around the Statute.

Mr. Turtur: I am trying now, your Honor please, to have your Honor within——

The Court: The man in my opinion was injured, if anywhere, in the silicate department.

Mr. Turtur: No, but it continued, if your Honor please, and he was subjected to soda ash in 1933. The soda ash that he was exposed to in 1933 was the same substance which he had been subjected to while working as a furnace man in the silicate department. He worked three days outside and two days inside subjected to the soda ash, and he specifically says so at page 131.

The Court: Has that case been appealed yet?

Mr. Rudner: I don't know if it has been appealed or not, I haven't heard. I have heard it was not going to be [fol. 56] appealed. It has a very interesting statement on the Statute of Limitations. I think it is the best exposition of the law of the Statute of Limitations in the State, on page 263.

Mr. Turtur: Here, your Honor, page 8. There is where Mr. Matey says he worked in the silicate and soda ash mill, soda ash, and the deposition, soda ash and sand. So it is definitely and positively proved that in the silicate department at the very beginning of the deposition, he was working with silicate and soda ash and sand.

Mr. Rudner: The third complete paragraph——

The Court: Where is this? Where do you want me to read? As I understand it, in great detail you charge this defendant with negligence in a certain department. Now you want to amend and say that the negligence took place in some other department.

Mr. Turtur: No, your Honor please.

The Court: Well, that is what you do. Have you even bothered to draft an amendment?

Mr. Turtur: No, I was going to ask your Honor if you would permit the amendment, and then I would draft it in accordance with your Honor's permission of that amendment.

The Court: Well, how could I tell exactly what sort of amendment you could draw legally.

[fol. 57] Mr. Turtur: I would add in there that the negligence of the defendant also continued in other departments where he worked, and they were apprised of what other departments he was working in when they were apprised of what the answers to the bill of particulars gave them, which included the silicate, phosphate of soda, soda ash, and so forth.

The Court: You cannot help your case with a bill of particulars.

Mr. Turtur: No, I realize that. Now I say that if your Honor, in view of the cases in New Jersey——

The Court: You charge negligence in the operation of one department, and as a result of that negligence you say injury took place. It now appears that you wish to charge negligence in another department.

Mr. Turtur: We did——

The Court: Just a minute. I personally question the good faith of your change. I think it is made simply to avoid the Statute, but leaving that out of consideration, you have the legal situation of charging negligence in one department, which turns out to be barred by the Statute, and wish to amend and charge negligence in another department and under different conditions.

[fol. 58] Mr. Turtur: Well, I say——

The Court: You have to say in that, of course, that the place in the other department was unsafe.

Mr. Turtur: Yes, and we will prove it, your Honor.

The Court: No, I would like to see any case that would permit such a radical departure from the original cause of action.

Mr. Turtur: I still say, your Honor please, that in this case, where they refer to the subject of amendments, Judge Ackerson, if you will pardon me for reading it——

The Court: Let me read it again. You see Judge Ackerson says, "Will not be held to state a new cause of action when the facts alleged show the same wrong with respect to the same transaction.

Mr. Rudner: This is an entirely new transaction.

Mr. Turtur: No, it is not an entirely new transaction, because we maintain that they kept on being negligent in permitting this man to inhale these fumes and these chemicals without giving him any safeguards, or without using any proper ventilation, or without giving him any respirator, or without using any form of device whatsoever to protect [fol. 59] this man, and never did they advise him of the fact that he was working in a dangerous condition.

The Court: Oh, don't argue. I think your legal remedy is probably to go and try to enjoin the Statute.

Mr. Turtur: Well, doesn't your Honor consider that these citations that I gave to your Honor—and I have more, if you will permit me to give them to you——

The Court: You just read your best. Have you any better case, closer on the facts? You just read me a lot of general principles, which I knew already.

Mr. Turtur: Well, I have here—You say you don't want me to read you the Pennsylvania cases.

The Court: If they are closer on the facts.

Mr. Turtur: They are closer on the facts as to amendment. I got up at five o'clock this morning and was in the office at six looking these up.

The Court: I would suggest it would have been a little better if you had gotten up at six when you drew this complaint. You wouldn't be faced with this situation.

Mr. Turtur: Yes, I appreciate that. Will your Honor [fol. 60] permit me to give you this case.

Gill vs. Berger, 43 New Jersey Law, 430: "An amendment within the power of the court to allow is not the beginning of a new cause of action."

The Court: I do not want any mere general statements of law read to me. I am thoroughly familiar with it. If you have any cases closer on the facts——

Mr. Turtur: May I give you the case of Swank vs. Pennsylvania Railroad, 94 New Jersey Law, Court of Errors and Appeals, page 546? That goes to the question of amendment.

The Court: Just a general statement of the law. That is no nearer.

Mr. Turtur: —— vs. New Jersey Manufacturers Land & Improvement, among other things, at page 167, New Jersey Supreme Court decision, 11 Miscellaneous, page 164, at 167. Among other things it says: "And even after the expiration of the statutory period, an amendment may be permitted if it merely expands or amplifies what was alleged in the cause of action already asserted." Doesn't this only expand, doesn't it only amplify?

The Court: I asked you, Mr. Turtur, not to give me any more general statements of law.

[fol. 61] Mr. Turtur: Here is the case.

The Court: I ask you not to give me any more general statements of law. Have you any cases anywhere near on the facts?

Mr. Turtur: Well, may I ask your Honor, that you permit me to get, as long as you don't want statements as stated in the Digest that I got it from, may I get all of these books and bring them to your Honor, if you have them in your Library?

The Court: Of course I haven't them in my library. You know that.

Mr. Turtur: May I get them, please?

The Court: They are not in my library.

Mr. Turtur: Oh, they are not. Well, may I give you exactly what the Digest shows?

The Court: What are the facts? Are they anywhere near similar to these?

Mr. Turtur: I got it out of the Digest.

The Court: The answer is, you don't know.

Mr. Turtur: I don't know, your Honor please, except the

Digest gives these statements verbatim, and this is the way I took them out as to amendments of complaint, injuries to persons.

The Court: We all know that if it doesn't amplify it is permissible; we all know that.

Mr. Turtur: That's all this is, and that's all I say it is, [fol. 62] is amplifying the complaint, and then it refers as of the date when the complaint was filed in that case that I gave your Honor, in Gill vs. Berger, 43 Law 430. Now take this case, Lehigh National Bank vs. Catasaqua, 128 Atlantic, 536, 236 Pennsylvania, page 1: "Though an amendment cannot be made after time fixed by Statute for the bringing of action for the purpose of introducing a new cause of action, or making additional parties defendant, it is proper to correct names or description of the defendant, and other facts may be set forth if no new basis of recovery is stated."

The Court: Do you think that helps us much?

Mr. Turtur: I think so, your Honor.

Mr. Rudner: It is against you.

Mr. Turtur: "If no new basis of recovery is stated." We are not stating any new basis of recovery, because it goes to the gist of the action, and what is the gist of the action? The continuing negligence of this defendant company, no matter where this man worked, in permitting him to inhale these fumes, and to have him subjected to inhale these fumes, and to have him subjected to this soda ash that he originally was subjected to when he worked in the silicate [fol. 63] department, and he continued to be so subjected in 1933. Now in the case of Gaeta vs. Philadelphia B. & W. R. R. 76 Atlantic 56: "Since the running of the limitations against the cause of action is suspended by the bringing of the action in time, limitations cannot be invoked in bar of the cause of action set forth in the original declaration, nor in bar——

The Court: Get me Corpus Juris on the Statute of Limitations and Amendments. I will see if I can look it up for you.

Mr. Turtur: I certainly appreciate it, your Honor please, and may I state that I am immensely appreciative——

The Court: I want to suggest as a practical matter, do you want to spend the money on having these experts and people here, with the possible chance of being reversed on the Statute of Limitations?

Mr. Turtur: I would suggest this, that if your Honor does permit me to amend my complaint in accordance with the cases that I will cite to your Honor, and have cited to your Honor, I am willing, sir, that if a recovery were had, that we take our chance in the Circuit Court of Appeals, if the other side does appeal, and I say that your Honor's discretion in the matter——

[fol. 64] The Court: You won't get back the money that you have spent on these experts.

Mr. Turtur: Well, that is perfectly all right, your Honor please. I will be willing to take that chance, because I feel certain that the Circuit Court of Appeals will sustain your Honor if you do allow an amendment to the complaint.

The Court: I feel pretty sure they won't.

Mr. Turtur: Well, I feel certain they will under the cases that I read.

The Court: Well, the cases you read were just about as helpful as if you read some cases from South America.

Mr. Turtur: Well, may I give you some more?

The Court: I will not listen, counsel, to any more general statements of the law. We have had already five statements of the law and no one which gives the general statement. Now I asked you, and I suppose I will spend the day, if necessary, looking it up for myself, as you don't seem able to do so, and I can say to you I cannot believe that this man was not in condition to tell you what actually happened when you filed this complaint. What was the date?

Mr. Turtur: October 1, 1935.

The Court: October 1, 1935, when he is by agreement, [fol. 65] much worse now, and yet he is able to tell in some detail and with some accuracy what happened.

Mr. Rudner: Six hours.

Mr. Turtur: Doesn't the reference to that page——

The Court: So it is my opinion that you overlooked the Statute of Limitations at the time you filed this complaint, and are now trying to repair the damage to your client that has been done.

Mr. Turtur: Page 8, you will note where he was subjected to the soda ash.

The Court: That is not the point. He was very clearly able to say exactly where he worked at the time that you examined him the other day.

Mr. Turtur: That's right.

The Court: Now you say that he was in no condition to tell you at the other time.

Mr. Turtur: That is right.

The Court: It is very curious that a year later he is more clear than he was a year ago, although he is much worse.

Mr. Turtur: The physicians will tell you, your Honor please, that some days he is better, and for weeks and weeks after he is much worse.

[fol. 66] The Court: Is there any assertion that his mind isn't clear?

Mr. Turtur: There is an assertion, your Honor please, that he is so sick that he cannot think clearly at certain times.

The Court: He cannot do what clearly? What did you say, he cannot do what clearly?

Mr. Turtur: He cannot think clearly at certain times.

Mr. Rudner: Six hours he could think as clearly as you or I. It was a strain, six hours. I wanted to quit a half hour and take it up the next day. Mr. Turtur says no, I will finish today.

Mr. Turtur: He said, "I will finish today, even though I die. I want to get this thing over with." That is what Mr. Matey said.

Mr. Rudner: To allow an amendment under these circumstances, sir, is to destroy the purpose of the complaint and to permit by amendment what cannot be done in the original cause, at this stage of the game. We have an action with respect to the silicate department barred at the very date that suit was started. It was absolutely barred.

Mr. Turtur: Your Honor already allowed the amendment when we had the trial, and your Honor granted a mistrial.

[fol. 67] The Court: I would allow the amendment if I thought it had a ghost of a chance in the Court of Appeals. That is what I am trying to determine.

Mr. Turtur: And I certainly think under the cases the Court of Appeals will sustain your Honor if you do permit the amendment.

The Court: You had better sit down and try to write the amendment. That at least will be of some help.

Mr. Turtur: All right, your Honor.

[fol. 68] The Court: What was your case, Mr. Rudner? against the amendment? Because all the cases in New Jersey digest permit it, that I have at least.

Mr. Rudner: The O'Shaughnessy case.

The Court: That permitted it.

Mr. Rudner: That was a different situation.

The Court: I didn't ask you that.

Mr. Rudner: You asked me what cases do not permit it. Dallello vs. Manufacturers Land & Improvement Company. In that case the complaint charged defendant with negligence in failing to keep his sidewalk in a proper state of repair. After the statute of limitations had run against the action, plaintiff sought to amend the complaint by alleging defendant was negligent in the construction of the sidewalk by reason of the fact——

The Court: Where is that citation?

Mr. Rudner: The amendment was not allowed, 11 N. J. Misc. 164.

Mr. Turtur: I could answer that, I have it here. Do you want it, your Honor?

The Court: It doesn't seem to be reported in this digest.

[fol. 69] Mr. Turtur: I have it here if you want it. What is the page on that?

Mr. Rudner: 164, 11 N. J. Misc. 164.

Mr. Turtur: That is setting up an entirely new cause of action, your Honor.

The Court: Oh, please don't use general language like that. Of course, we all know that's the point. You do make it so difficult. Of course, that case is clear. Have you anything better than that?

Mr. Rudner: Casavalo vs. D'Auria, 12 N. J. Misc. 81, affirmed 113 N. J. Law 328. That action was predicated upon a claim——

Mr. Turtur: I have it.

The Court: That also isn't close. I agree with both those.

Mr. Rudner: But here we have this situation, your Honor, which we don't have in any of these cases, in the instant case, having regard to the silicate department. Standing in that department alone, the action was barred on the date that the suit was instituted. In these other cases where amendments were allowed, the action was not barred on the date the suit was started.

[fol. 70] The Court: What difference does that make? You have said that several times but I don't see the logic of it. What is the logic of it?

Mr. Rudner: What is sought to be done is this, add certain allegations for the purpose of bringing within the statute something which on the very day the suit was started was without the statute. The instant case is far stronger than any of these cases.

The Court: I don't understand the logic of that. I don't think there is any logic.

Mr. Rudner: I am not making myself clear. This suit was started on October 1, 1935, at least it is tested as of that date. We rely upon that. It refers limitedly to the silicate department, that the man worked in that particular department and suffered these alleged injuries in that department. In our answer we say that he worked in that department for a time but not after November 1, 1932, and that is put in issue by plaintiff's reply; he denied that. Having regard to the facts that he worked in the silicate department in the fall of 1932 or at the very latest the early part of 1933, the cause of action set forth in the complaint because of the silicate department, was barred on the date that suit [fol. 71] was instituted.

The Court: What difference does that make?

Mr. Rudner: Your Honor please, I think it makes a tremendous difference.

The Court: The whole question is whether it comes within that rule about the same gist, &c. What difference does it make what date——

Mr. Rudner: That is one phase but it is a broader phase, plus the gist, here he is adding something, changing the whole complexion.

The Court: In all these cases the added complaint is to avoid the statute in all these cases.

Mr. Geuther: I don't know whether what I can add will clarify what Mr. Rudner means but I see his point. In these cases the amendment has been allowed after perhaps the statute has run but the original action was a good one.

Mr. Rudner: That's right.

Mr. Geuther: In other words, that original action was good and they merely say that having started an original action, the amendment can be added even though the statute has run, but Mr. Rudner's point is in this case the original action was bad because the statute had obviously run even [fol. 72] when the action had started. So that an amendment now would have the effect of recreating a good action where a bad one had been originally instituted.

The Court: Isn't that so in all these cases?

Mr. Geuther: No, because there the original complaint was brought within the statutory period and then after the case had been pending for some time an amendment was sought. That amendment, of course, was barred by the statute but they said the original action having been good, "We will allow the amendment in certain cases, subject, of course, to certain limitations." But in this case our point is that there was no good original action, so that an amendment would be making that original action, which was bad, good in effect.

The Court: Again I say, isn't that so in all of these cases?

Mr. Geuther: Not this case which you have before you. The original actions——

The Court: I now see your point, Mr. Rudner.

Mr. Rudner: I think it is a very good point.

The Court: Well, have you any cases on that?

[fol. 73] Mr. Rudner: No, I looked for some cases, I spent quite some time, but it seemed to me so logical, flowing from those cases which you have before you, that if assuming an original action as being proper and not being barred, assuming that cannot be amended under the circumstances suggested by the case which you have before you, how much more so cannot a suit be amended which in and of itself is bad, because of the statute a fortiori?

The Court: You might find, I should think, some authorities on the point. Of course, the only time that it could possibly arise, I should think, would be in these continuing injury cases, just this class of cases.

Mr. Rudner: That reminds me, Judge Clark, I have a case—this is a Tennessee case, Brown vs. Tennessee Consolidated Coal Company, 83 Southwestern (2d) 568. I will give you the facts. Plaintiff worked in the coal mines of the defendant. He charged that while working he inhaled fine particles of rock and developed silicosis or pneumonoconiosis. The action was commenced on February 12, 1932. He quit his employment on March 20, 1931. I think it is a [fol. 74] one year statute. Defendant pleaded the cause of action was barred by the statute of limitations for all acts of negligence accruing previous to February 12, 1931, or in other words, any cause of action which the plaintiff had was for wrongful acts occurring between February 12 and March 20, 1931. That defense was sustained by the court. Anything that happened prior to this date was out.

The Court: I don't follow, I don't see the point of that citation.

Mr. Rudner: Pardon me?

The Court: How does that affect this question?

Mr. Rudner: It established the principle that anything charged beyond one year from the date of the institution of suit could not be considered in the cause and was barred. It is not directly involved. I am just giving you that principle. Now, on the statute I have read almost every case that I can find in the digest that pertains to the statute of limitations. Of course, it is more or less of a new question in the last fifteen or twenty years, but in this case I am convinced beyond any question of doubt that on the complaint as framed and having regard to the circumstances of the [fol. 75] case, no amendment whatsoever can be allowed.

The Court: I really don't know what to do; it is the most unfortunate thing that you should have gotten the pleadings in this condition, Counsel.

Mr. Turtur: I think the greatest answer to that, your Honor——

Mr. Rudner: My reason for bringing the question up at this time is this, to save time, and if the plaintiff seeks to take an appeal the record will be smaller, he won't be subjected to that heavy charge.

The Court: You will be the one who will have to appeal in any event.

Mr. Rudner: If the plaintiff wants to appeal on this limited question——

The Court: Well, if the plaintiff got a verdict you would have to appeal.

Mr. Rudner: Yes, that's right.

The Court: Let me see your amendment.

Mr. Turtur: No. 2, your Honor, now reads: "The plaintiff was employed by the defendant as furnace man operator and general worker in the silicate department of defendant's [fol. 76] plant." I will add to that "and also employed in other departments of the defendant's plant, where he performed his duties as he was directed to do during his employment." That I will add to paragraph 2. Then in paragraph 4, "During the course of his employment in and around the said department" I will add the words "and/or departments, he necessarily came in close contact with metallic mineral gas and other injurious substances" &c.

That is how the complaint will read, your Honor. Your Honor notes that——

The Court: You see, you have gotten so many complications. The fact is, of course, that there was no negligence probably in the other departments.

Mr. Turtur: There was, your Honor.

The Court: You don't even charge it. Now, supposing the evidence shows that there was no negligence in the other departments?

Mr. Turtur: There was and the depositions show it, and also the witnesses to be produced will endeavor and definitely show that there was negligence; the depositions show it and the witnesses will show it. Then, of course, if we don't——

[fol. 77] The Court: You have gotten the case in such a posture——

Mr. Rudner: When Mr. Turtur made his first inspection of this plant he didn't want to see any other portion except the silicate department.

Mr. Turtur: And the only reason why I didn't want to see any other portion except the silicate department was because I didn't know until the day before the depositions were taken that this phosphate room came into the picture.

The Court: In other words, you didn't know that the statute had run.

Mr. Turtur: No, not until one day before did Mr. Matey mention the phosphate department.

The Court: I simply don't believe it.

Mr. Turtur: On my word of honor, your Honor, and I do not and will not, under any circumstances, misrepresent any fact to your Honor or anybody else. Yes, sir. Because even in the order I provided, which your Honor signed, permitting us to inspect in the department or whatever departments or places——

The Court: What was the phosphate department, what was that, a building?

Mr. Turtur: That is about five or six hundred feet away.

[fol. 78] The Court: A building?

Mr. Rudner: He used to work outside most of the time on the waterfront.

Mr. Turtur: That is not so.

The Court: What was his occupation in the phosphate department? Does it show that in the depositions?

Mr. Rudner: He would dump rock, phosphate rock, into a container.

Mr. Turtur: Into bins, which had no ventilation and which had no windows of any kind, and into bins where in back of him was soda ash and every time that was dumped the soda ash would come up around him and he would be subjected to the same thing. That is in the evidence, your Honor, and I am not making any misstatements.

Mr. Rudner: Mr. Turtur, would you object if I said a few words so you don't hold the floor all the time? He was out doors on the waterfront, open, all sides.

Mr. Turtur: He was working three days out and two days in.

The Court: Did the jury see the phosphate department?

Mr. Rudner: No, only the silicate department.

[fol. 79] The Court: I guess we will have to send them back there then if we permit the amendment.

Mr. Turtur: I haven't seen the phosphate department, your Honor. I asked him for it after the last trial and they refused it in their letter to me.

Mr. Geuther: After the last trial, when the question of this amendment came up, when you had that inspection, Mr. Rudner turned to you in my presence and said, "Is there anything else in the plant you care to see, the phosphate department or anything else" and you said "No, that's enough," I distinctly remember.

Mr. Turtur: Well, I am not trying to argue with counsel, your Honor please, I am only telling you what the facts there were.

The Court: You see the conclusion is inescapable, that you are composing this phosphate argument to meet the statute.

Mr. Turtur: No, your Honor, absolutely.

The Court: Yes, it is; anybody would think so.

Mr. Turtur: The conclusion is not inescapable, for the [fol. 80] reason that the evidence is definite, certain and positive where Mr. Matey says positively that he was transferred to the phosphate department and that no——

The Court: Is there any complaint about dust there? Let's see it.

Mr. Turtur: Surely, plenty of it.

Mr. Rudner: "I didn't get sick of the phosphate." Page 60.

Mr. Turtur: Page 128, your Honor:

"Will you answer the question, tell us everything.

"I was working in the Door plant.

"What Dorr plant?

"Phosphate soda Dorr plant.

"What did you do there?

"Dumping rocks, and I was operator. That's all I can tell you.

"What did the operator do?

"What did the operator do? Start the mills, grind up phosphate and rock and then start the pumps pumping sulphuric acid in the mills, and that goes in the tank and when it goes from one tank to another and when it goes in the tanks it will settle down, that mud and that rock will settle down and we have to pump and we have to push [fol. 81] that mud on the pumps and we pump that mud from the tanks to tank four times before we get on the drier.

"While you were doing this operation was there any phosphate of soda dust there?

"Sure, because there is beside us, right close behind us.

"Right close beside you?

"Yes.

"What was close beside you?

"Soda Ash, that makes the soda.

"Referring to this soda ash and this phosphate work that you were doing, would that give off any dust?

"Soda Ash gives dust and the rock gives little dust.

"What rock?

"Phosphate rock.

"Was there a lot of dust or a little dust?

"A lot of dust. I wouldn't say a little dust because if it was little dust we don't have to sweep every day three times.

"While you were doing this operation did anybody tell you that this dust was dangerous or harmful to you?

[fol. 82] "No.

"Did you know that this dust was dangerous or harmful?

"No."

Then on page 129, your Honor:

“What did you mean when the question was asked of you about dust and windows in the phosphate department and when you gave your answer you were just about to say ‘but in the bin’—and then you did not answer.

“He asked me how many windows and I said ‘but in the bin where the dry soda is there are some windows, you are not allowed to open because the dry soda will fly out and the men, if you work there, when they take the dry soda for orders and they have a belt in the cellar there so that soda ash goes in the belt and that smokes.

“What do you mean by smokes?

“The dust, you have to break that.

“What did you mean when you say the dust and smoke?

“The soda, dry soda. That dust comes up when you hit it.

“What did you mean when you used the word ‘smoke’, what did you mean by that?

[fol. 83] “The dust is like smoke.

“It is as heavy as smoke?

“Yes, sure.”

The Court: And that is talking about the phosphate department?

Mr. Turtur: The phosphate department, exactly.

Mr. Rudner: Here is what he says on page 119: “I got sick in that silicate department. I was sick man in the phosphate. I got sick first time in the silicate department and the phosphate department I got my wrist burned and I got the hernia, phosphate.”

Mr. Turtur: Continue on. If you continue on you will just exactly see what is there as to the amount of dust in the phosphate department also.

Mr. Rudner: Most of the stuff in the phosphate department is not only soluble but liquids; you cannot get dust from liquids. That is the final product, phosphate of soda.

Mr. Turtur: That isn't so because the evidence shows definitely different and the witnesses will prove that that is not the case.

The Court: Well, I cannot believe, Mr. Turtur, for one [fol. 84] minute that you weren't fully advised by your client at the time that you drew this complaint. It is incredible to me that he should be able to be so very accurate one year after as to just exactly what happened there. It seems to me that in drawing the complaint, as you did, you did not exhibit the skill that one would have expected, and that you have thereby done your client an extremely serious injury, maybe a fatal one, as far as his attempt to recover compensation is concerned. However, as the point is a technical one, I will allow the Court of Appeals to pass on it. It is a doubtful point, in my opinion, if it goes against you.

Mr. Turtur: Your Honor, then——

The Court: I again say to you you have done your client a serious injury.

Mr. Turtur: Your Honor will then permit me to amend the complaint as hereinbefore stated?

The Court: Yes, and the jury will have to go again and look at the phosphate department now.

Mr. Rudner: Your Honor is allowing the amendment?

The Court: Yes.

[fol. 85] Mr. Rudner: In what language?

The Court: He has just read it.

Mr. Rudner: Well, your Honor, that covers the whole plant.

The Court: I think you ought to limit it to the phosphate department.

Mr. Turtur: Yes, in the phosphate department and in the Dorr plant where he was working.

Mr. Rudner: That language isn't so.

Mr. Turtur: Paragraph 2 will be amended to read, "and also employed in other departments of the defendant's plant where he performed his duties as he was directed to do during his employment."

Mr. Rudner: Well, now, you have used the words "other departments." Will you please specify the departments?

Mr. Turtur: The Dorr and the phosphate. The Dorr is a department of the phosphate department, your Honor please, D-o-r-r.

The Court: Please clarify it, Mr. Turtur.

Mr. Turtur: All right. "—also employed in other departments of defendant's plant where he performed his duties as he was directed to do during his employment in [fol. 86] the phosphate department and the Dorr department."

Mr. Rudner: Now, your Honor please, I am objecting to the allowance of the amendment under the circumstances which we have argued. Our theory—may I state the grounds so the record will show it? I object to the allowance of the amendment to the complaint to include ~~the~~ phosphate department, the Dorr department or any other department outside the silicate department for these reasons: yesterday, of course, that question was raised under our notice and your Honor limited the proofs to the silicate department. Now on further argument today——

The Court: Yes, ~~I am~~ reversing my stand, I concede that. I think it is too bad that this client should suffer from counsel's negligence. That is one reason that has influenced me.

Mr. Rudner: Well, the grounds I suggest are these, that the cause of action itself as reflected in the complaint is barred by the statute of limitations and was barred on the date the summons was issued, because the summons is tested as of October 1, 1935. Now, the complaint alleged that this man was employed in the silicate department as [fol. 87] a worker, helper and various other phases, and that working in that particular department he suffered these alleged injuries; that he was incapacitated on or about November, 1933. Now, we say this, that that particular action, having regard to the admitted fact, and the plaintiff admits that the plaintiff was not employed in the silicate department beyond the early part of 1933,—having regard to those facts, when this original suit was started it was a bad suit in that the statute had barred that action with respect to the silicate department. Now, at this stage plaintiff is seeking not only to make good a bad cause of action, he is trying to do at this stage,—seeking to amend an action which on the dates given in the complaint would have been barred if we take the period as of November, 1933, as being the last time of employment. I don't think the circumstances of this case warrant an amendment. I think the authorities are generally against it.

The Court: Well, I have said it is a difficult point to determine and I am only——

Mr. Rudner: Well, now, your Honor is allowing the [fol. 88] amendment as I understand it in those respects stated by plaintiff's counsel?

The Court: Yes.

Mr. Rudner: To add the phosphate department?

The Court: Yes, or whatever he said.

Mr. Rudner: May I have an exception, sir?

The Court: Yes, certainly.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: Now, that carries us back to yesterday and I suppose your Honor having ruled favorably to me yesterday, I suppose your Honor is now reversing that ruling?

The Court: That is correct.

Mr. Rudner: And also ruling against me on that. May I have an exception as to that, so my exception goes not only to the allowance of the amendment but to the denial of my motion of yesterday, limiting the proofs and testimony to the silicate department exclusively.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 89] Mr. Rudner: Now, may I ask this further, that our answer as filed, including each and every separate defense therein contained, stand as the answer of defendant to the complaint of the plaintiff as amended?

The Court: Yes, certainly.

Mr. Rudner: Now, I don't know whether your Honor is going to want formal pleadings filed or let the record stand as it is. I say that because at common law pleadings, the record consists entirely of the pleadings, postea and judgment.

The Court: I think formal pleadings ought to be filed on both sides.

Mr. Turtur: We ought to have new pleadings filed?

The Court: Yes.

Mr. Turtur: Unless you want to waive it and let the record stand as I have read it into the record?

The Court: I think they ought to be filed.

Mr. Turtur: Very well, your Honor, I will comply with your Honor's order.

Mr. Rudner: In that case we want to file a formal answer. I cannot file a formal answer until he files a formal [fol. 90] complaint.

The Court: He will have to file a formal amended complaint.

Mr. Rudner: That's right. And I won't be able to do any dictating until Saturday morning; if this case goes on I will have to file it on Monday.

Mr. Turtur: Your Honor suggested that they would have to visit the phosphate department and the Dorr department; does your Honor want to direct that that be done during the noon recess?

The Court: No, they will do it after hours, after four o'clock.

Mr. Rudner: Do what, go out to the plant? At your expense, I don't think it is fair to force us——

The Court: Certainly at his expense.

Mr. Turtur: Very well, I will pay for the bus expense.

Mr. Rudnur: We have gone half the cost of his depositions.

Mr. Turtur: I will pay for the bus expense, your Honor.

Mr. Rudner: Now, is your Honor allowing further in- [fol. 91] spection of the premises?

The Court: Of the phosphate plant.

Mr. Rudner: May I have an exception to your Honor allowing inspection of the phosphate department, on the same grounds urged with respect to the amendment?

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Geuther: We object on the further ground that if the amendment is allowed to relate back to the original cause of action as instituted in the complaint, it revives a cause of action that was bad at the time of the filing of the said suit. On the other hand, if the amendment is allowed as of today's date, it is creating a cause of action after the statute has expired as to any employment whatsoever.

The Court: Of course, you gave me no authorities for that proposition.

Mr. Geuther: That is our objection, sir.

The Court: Well, I wish you would give me some authorities on it.

Mr. Geuther: I will attempt to do that sir.

[fol. 92] Mr. Rudner: That is the objection and we have an exception, of course, as to all those objections.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Geuther: May I suggest I have just been advised that the phosphate department covers acres of ground and that it might be well that the Clerk be instructed to ask the foreman at the plant where Matey actually worked so that they limit their visit to that particular part.

The Court: All right.

Mr. Turtur: He worked in and around that plant, your Honor please, also the Dorr plant and the phosphate department.

Mr. Geuther: My request is that wherever he worked, regardless of where it is, they be allowed to visit but that if he definitely did not work in other portions, that he be not allowed to go there.

Mr. Turtur: The difficulty is that the foreman may say one thing and the evidence may show another. The evi- [fol. 93] dence definitely shows that he worked at the phosphate department, also the Dorr plant, and the silicate department and also three days outside and two days inside of these bins of the Dorr plant. So I think we would have to do it according to the evidence.

Mr. Rudner: Yes, yes.

The Court: All right.

Mr. Turtur: May I proceed, your Honor?

(The following proceedings took place in the presence of the jury).

Mr. Turtur: Mr. Foreman and Gentlemen of the Jury: These are the depositions taken at the house of Mr. Matey. This is the stenographer's affidavit.

(Mr. Turtur thereupon proceeded to read the deposition of George Matey. Mr. Turtur read down to objection on page 10.)

Mr. Rudner: I move to strike that answer of the witness on the ground that there is no allegation in the complaint with respect to any defects in any appliances with which Mr. Matey worked. The basis of the charges of negligence are solely with respect to not furnishing respirators in the [fol. 94] several places he worked, no suggestion or allegation as to any of the appliances or any parts of the appliances being in any wise defective.

Mr. Turtur: I say, your Honor please, in my complaint the negligence of the defendant was in this: (a) in failing to provide the plaintiff with a safe place to work; (b) in failing to provide plaintiff with adequate and sufficient protection or appliances to safeguard him in his said work; (c) in failing to provide a proper ventilation system in the plant. I respectfully submit that that is broad enough to cover the working conditions in and around the plant and that is exactly what he is testifying to now.

Mr. Rudner: I move that the answer be stricken on the ground that it does not come within the purview or scope of the pleadings with respect to the allegations of negligence.

Mr. Turtur: I respectfully submit that at the beginning of the time the testimony was so taken, Mr. Rudner and I agreed that if there was an objection the objection should be noted then upon the record.

The Court: Is that a new objection, is this not noted on the record?

Mr. Turtur: No, sir.

[fol. 95] Mr. Rudner: No, it says objections to counsel's questions will be noted by respective counsel and passed upon by the court. That does not, however, preclude a motion at any time to move to strike the answer.

Mr. Turtur: But Mr. Rudner did not object at the time these depositions were taken and it was stipulated that if there were objections to be made they were to be noted on the record and passed upon by this court. Now, I contend that the objection is not only not noted on the record but that the complaint is broad enough to cover the working conditions.

The Court: What was the agreement?

Mr. Turtur: I will read the stipulation. "Objections to counsel's questions will be noted by the respective counsel and passed upon by the court at the trial of this cause."

The Court: Did you note [illegible] objection at the time?

Mr. Rudner: No.

The Court: Well, I think you should have noted it so that counsel might have reframed the question.

Mr. Rudner: I submit, sir, motion to strike an answer is [fol. 96] always in order even after given because after all pleadings limit the proofs.

The Court: Your motion now is to strike, is it?

Mr. Rudner: Yes, strike that answer, on the ground that it is beyond the scope of the pleadings.

Mr. Turtur: Page 2, your Honor.

Mr. Rudner: The bottom of page 10.

Mr. Turtur: Pardon me. "The objections to counsel's questions will be noted by the respective counsel and passed upon by the court at the trial of the cause." This was the Commissioner speaking.

Mr. Rudner: I don't object to the question. I object to the answer.

Mr. Turtur: Well, I know, but it comes too late. We are not in a position to bring George Matey in now and ask him a different kind of question. The time to have objected was when I was asking the question, the same as before.

Mr. Rudner: May this matter be held until it appears at a later time in the record, it does appear at a later time.

(Mr. Turtur proceeded to read up to page 14: "I told [fol. 97] only the foreman and the foreman told the boss."

Then Mr. Rudner says: "I move that that be stricken out as to what the foreman told him.

Mr. Turtur: I insist that the question be answered on the ground that the foreman is a boss within the meaning of the case, and that he is not a workman.

Mr. Rudner: The witness has stated that 'I told the foreman" and I ask that everything beyond that be stricken on the ground that it is hearsay, that it is not proper to inquire or to have this witness state what the foreman may or may not have told someone else."

Mr. Rudner: That is clearly objectionable.

Mr. Turtur: He says he told the foreman but he didn't state in the answer anything as to what the foreman said, your Honor.

Mr. Rudner: Is your Honor ruling on that?

The Court: Yes. Is it by way of exception or by way of striking?

Mr. Turtur: Mr. Rudner speaking: "I move that that be stricken out as to what the foreman told him." There is nothing in the answer as to what the foreman told him.

[fol. 98] Mr. Rudner: Why, "The foreman told the boss", as clear as daylight there.

Mr. Turtur: "The boss, he knows it but I didn't tell the boss, I told the foreman and the foreman told the boss." Oh, I see, Well, does your Honor strike that?

The Court: Certainly.

(Mr. Turtur thereupon proceeded to read to page 17, continued on page 18.)

The Court: Where does it say anything about defective appliances in the complaint?

Mr. Turtur: Here is my answer. In my complaint I said that there were defective appliances and that is a part of the pleading. Further than that, paragraph 5 of the complaint states that the negligence of the defendant consists in this: in failing to provide the plaintiff with a safe place to work; (b) in failing to provide plaintiff with adequate or sufficient protection or appliances or safeguards in the said work; and (c)——

The Court: Doesn't that cover the appliances? Isn't that an appliance?

Mr. Rudner: They claim a hole in the chute or tunnel [fol. 99] which conveys this mixture.

The Court: Isn't that an appliance?

Mr. Rudner: I submit, sir, it doesn't come within——

The Court: Isn't it an appliance?

Mr. Rudner: I suppose it might be an appliance. May I have an exception, sir?

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

The Court: Now, Counsel, the law that we were discussing doesn't seem to me to be in any way in point. I want some cases in point on the subject of amendment. The cases that you gave me are for this proposition: when the amendment is made the statute has run but the original cause of action is in time. Now, this case is not that case at all and this is what Mr. Rudner was trying to say, or maybe he did say and I was incapable of understanding it, but this is what it is——

Mr. Rudner: I take the blame.

The Court: Anyway, we didn't get together on it, but I have been thinking about it and this is what he says: [fol. 100] In this case, if the amendment is made, the original cause of action is barred and the purpose of the amendment is to set forth facts which will make the cause of action a continuing one and thereby prevent the original cause of action from being barred. Now, you gave me cases that had no more to do with it than if they had been in the criminal law. Mr. Rudner didn't give me any cases and his cases were equally inappropriate..

Mr. Rudner: I say to your Honor a fortiori——

The Court: Well, I don't know that that is so and I suggest that you——

Mr. Rudner: I am having a research made now, as a matter of fact.

The Court: I suggest you look in those cases of continuing injuries. That is where you would find it, I think, I mean these occupational disease cases.

Mr. Rudner: All these cases on occupational diseases statute of limitations I have read and those cases all presen questions, not of amendments but where suit has bee brought years after, and all of them seek to contend tha the starting point is not the last exposure but the date as [fol. 101] of when the plaintiff claims to have had some knowledge of his injury. Do you see? That is the question dealt with in all those cases.

Mr. Turtur: In our case he never had knowledge of any injury.

The Court: Oh, you mustn't act in such a casual way about it, Mr. Turtur; I don't want to keep admonishing you, but here is a poor man who is hurt and his case has gotten in the most frightful mess. I cannot very well act as his counsel. We wasted an hour this morning really talking about something that had nothing to do with it, as I see it.

Mr. Rudner: We are having a search made right now, as a matter of fact.

The Court: Originally, you brought an action which was barred.

Mr. Rudner: Of course, that influenced me when I used the words "a fortiori." From these particular cases it seems to me strikingly so that when the original case——

The Court: No, but those cases have nothing to do with it.

Mr. Rudner: It seems so clear that when the original [fol. 102] cause as reflected in the complaint is admittedly barred, standing alone, I don't know how you can revive a dead action which as of the date of being instituted is dead.

Mr. Turtur: That was not a dead action, your Honor please, for the reason that at the date it was instituted there was a continuing cause of action in that regardless of whether or not he was subjected to the silicate department in 1932; he was, however, subjected to the same kind of a chemical, subjected to it in November, 1933, that he was when he worked in the silicate department in 1932.

The Court: You see you cannot ask for a voluntary nonsuit now and file the thing properly.

Mr. Turtur: That is true.

Mr. Rudner: And he couldn't have asked for a voluntary nonsuit on the date the suit was started.

The Court: Yes, until November, 1935, he could have asked for a voluntary nonsuit.

Mr. Rudner: If he was employed in the silicate department, but he wasn't employed in the silicate department after, at the very latest, the spring of 1933.

[fol. 103] The Court: No, no, he brought an action on silicate which he shouldn't have done. That action was barred when he brought it.

Mr. Rudner: That's right.

The Court: He could have between October, when it was filed, and November, 1935, brought the phosphate action.

Mr. Rudner: That's right.

The Court: And my question is whether he can now—you couldn't do it now—and my question is whether, by alleging other facts, you can relate them back to this barred cause of action, and that is the point you haven't covered and those cases had no more to do with it than the man in the moon.

Mr. Rudner: Isn't that very definitely clear from those cases, limited as they may be?

The Court: No, those cases haven't anything to do with it. They are talking about whether an amendment, which is out of time, can relate back to a cause of action which is in time.

Mr. Rudner: That is true.

The Court: We have the reverse.

Mr. Turtur: But taking the principles of those cases—

[fol. 104] The Court: there isn't any principle set down, it is just comparing the amendment and the cause of action, that's all. I am now assuming that within the principle of those cases the transaction is the same or the gist is the same or whatever you want to call it.

Mr. Turtur: That is why I referred your Honor to that case.

The Court: But you didn't give me a case on the point of the original cause of action being barred and an attempt to extend it after the time.

Mr. Turtur: It is our contention——

The Court: I don't care what your contention is, I have been patient enough and tolerant enough and I am trying to get your client back through the statute, which I think is an unjust defense, but you are not giving me much help. There must be some cases that dispose of the matter.

Mr. Rudner: I have examined every case on the statute of limitations that I can find. Here is one case that may be helpful, ~~Calhoun, 15 Pacific~~ (2d) 942, suit started in [fol. 105] September, 1931. The plaintiff worked in the glue room of the defendant company from April 20, 1926, until on or about the middle of May, 1928. His room was not ventilated in accordance with the statute of the state. He worked from the middle of May, 1928, until November in another room which was properly ventilated. Of course, that is not an amendment. The court held that everything which happened prior to the time that he worked in the room which is properly ventilated is barred.

The Court: What is that? Say that again.

Mr. Rudner: It is a collateral question, not raised directly. In the conclusions the court said that Claude Calhoun worked in and around the glue room from April 26, until on or about the middle of May, 1928, and from the middle of May, 1928 worked in another room, not alleged to have been improperly ventilated in violation of the Factory Act, until November 17, 1928. It is manifest that any injuries received from violation of the Factory Act by respondent culminated and accrued about the middle of May, 1928. His action was not commenced until September, 1931, [fol. 106] which was more than three years after the injuries had accrued under the Factory Act and would have been barred. That is not a question of amendment but it shows how definitely the trend is.

The Court: I don't care anything about trends.

Mr. Turtur: I think I can answer it, your Honor, by stating that the case that I showed your Honor and which you are very well familiar with, is the last exposure that counts.

The Court: Oh, please, please. You didn't file—you could have taken a voluntary nonsuit and brought the action down to the continuing exposure but it is too late to do that now and you are trying to use a bad cause of action just because it happens to be on file. You might just as well tack it to an automobile accident case, it seems to me.

Mr. Turtur: But your Honor please, if we set up in the automobile accident case that it was an automobile that did this thing and then came into court and tried to prove that it was an aeroplane, that is an entirely different cause of action, but where we say that the accident occurred on [fol. 107] the corner of Chestnut Street and A Street and then in the proof it shows that the injuries were received on X Street instead, and even though the amendment is made after the statute had run——

The Court: But supposing your original cause of action was barred?

Mr. Turtur: But our original cause of action was not barred.

The Court: It was barred on its face.

Mr. Turtur: No, the reason for it is because the evidence distinctly discloses that he was subjected to this soda ash at the time that he stopped working, when he was incapacitated from working, and he was getting the soda ash in the silicate room and also where he last worked.

The Court: Oh, Mr. Turtur, I will have to give up arguing with you.

(Recess.)

Afternoon Session

Mr. Turtur: Shall I proceed, your Honor?

The Court: Go ahead.

(Mr. Turtur proceeded with the reading of the deposi-[fol. 108] tion of George Matey down to page 41.)

Mr. Rudner: I object to that sort of testimony as irrelevant, incompetent, immaterial.

The Court: I sustain the objection.

Mr. Turtur: I ask an exception. Does your Honor want to hear my further explanation?

The Court: No.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

(Mr. Turtur continued reading down to page 48.)

Mr. Rudner: Your Honor please, I presume this testimony is now being received under the amendment allowed by your Honor?

The Court: Yes.

Mr. Rudner: May my exception go to that?

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

(Mr. Turtur continued reading down to page 55.)

The Court: I sustain the objection.
[fol. 109] Mr. Rudner: That will mean that all of page 55 will go out?
The Court: Yes.
Mr. Rudner: And part of page 56.
Mr. Turtur: It involves the issues, if your Honor please, because as I said this physician was not hired by us nor was he the treating physician.
The Court: What issue does it involve?
Mr. Turtur: As to what the physicians did.
The Court: Do you charge the physicians with malpractice?
Mr. Turtur: No, we don't charge the physicians with malpractice but we do say we complained to these physicians all the time as to what was the matter with us; all they kept doing was treating our skin.
The Court: You don't charge the physicians with negligence?
Mr. Turtur: No, I don't charge the physicians with negligence.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 110] Mr. Rudner: If your Honor please, after those objections there was further conversation carried over on pages 56 and 57. I take it your ruling covers all of them?
The Court: The doctor, you mean?
Mr. Rudner: Yes.
Mr. Turtur: Your Honor, there was no further objection taken at the time.
The Court: You are moving to strike out, Mr. Rudner?
Mr. Rudner: Yes, I move to strike out.
The Court: Motion granted.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

The Court: My ruling goes to the end of the doctor's conversation.

Mr. Turtur: This was already testified to as to complaints that he made, as to symptoms that he had and as to which the doctor examined him, the other physician, still employed by the Grasselli Chemical Company.

Mr. Rudner: I am going to have him in court.

Mr. Turtur: You are going to have him in court?

[fol. 111] Mr. Rudner: Yes.

Mr. Turtur: Well, he wasn't employed by us, was he?

Mr. Rudner: No. However, I think your Honor said strike out all the conversations. That covers all the questions except the last question on page 59.

Mr. Turtur: I asked other questions on pages 57 and 58, which is not as a result of a conversation with the doctor.

The Court: Let me look at it. Page 58. "Then you continued to work." That is proper.

Mr. Rudner: And from that point on?

The Court: Yes, from that point on.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: That takes to the last question on page 58.

Mr. Turtur: The record may show, in so far as page 65 is concerned, the picture in its present form is in evidence without objection.

(Photograph is marked Exhibit P-1.)

Mr. Rudner: Your Honor has ruled upon this matter in [fol. 112] respect to the holes. All I want is to note an exception on page 90 and 91.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

(Mr. Turtur thereupon concluded his reading of the depositions.)

(Jury excused.)

The Court: Now, I don't see any reason why I should have to look up law for either counsel in this case. However, I find what you ought to have given me and I suggest that you make a further research. It is on page 506 of 49 Corpus Juris under Pleading, paragraph 667 which reads as follows: "The cause of action which, as stated, is barred by the statute of limitations may be amended by changing the date when the cause of action is alleged to have arisen, although by so doing it appears that the cause of action is not barred. But a cause of action not barred may not under pretense of amendment of the allegation as to time be substituted for one barred by the statute." And it cites cases. Now, you can look at those in the Digest, [fol. 113] those cases, and run them down. That is your point, Mr. Rudner. That is what is being done in this case. An attempt is being made to change the time. Now, one of those cases is in the Southeastern Reporter and, as you know, you can find the key section from that. The cases that you honored me with this morning I can say to you on either side have no more to do with the legal proposition that you were advancing than they had to do with the law of murder, whatever. Mr. Jaeckel will be in charge of the expedition.

Mr. Rudner: Half-past ten, sir?

The Court: The jurors are going to be taken up to the plant tomorrow morning.

Mr. Rudner: Oh, I forgot to say, your Honor please, Mr. High tells me the phosphate department has not been operated for a week but the plant is there; there is no operation, there hasn't been for some time past. I told Mr. Turtur about that this noontime.

The Court: Do you still want them to go?

Mr. Turtur: As long as the plant is not in operation, unless your Honor thinks that they ought to see the same department, in view of the physical location.

[fol. 114] The Court: It wasn't what I wanted to do, it was what you wanted to do. I am indifferent.

Mr. Turtur: Well, they might see it, your Honor please, from the standpoint of the physical location and just exactly where he worked and get an eye view of the department.

The Court: All right, it won't take so long.

Mr. Turtur: I don't think so, your Honor, as long as it is not in operation. Can we arrange that for tomorrow morning, Mr. Jaeckel, before we come to court?

The Court: Yes.

(Adjournment taken to Thursday, June 11, 1936, at 10:30 A. M.)

[fol. 115] Thursday, June 11, 1936.

Case continued.

Appearances as before.

(The jury returned from the view of the plant.)

The Court: Proceed, Mr. Turtur.

PAUL MESSAROS, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Paul, where do you live?
A. Linden, New Jersey.
Q. How old are you?
A. 40.
Q. Did you ever work for the Grasselli Chemical Company?
A. Yes.
Q. When did you start working for them?
A. 1931.
Q. And when did you stop working for them?
A. 1935.

Mr. Rudner: Is the witness reading from something.
[fol. 116] The Witness: No.
Mr. Rudner: What have you got in your hand?
The Court: What have you got in your hand?
The Witness: I have a card.
The Court: What? Let's see it. Where did you get that?
The Witness: My wife was mark it for me.
The Court: When?
The Witness: Last night when I am going home.
The Court: How did she happen to do that?
The Witness: Well, I told her she be going to mark it for me.

The Court: Why did she mark it with 1931 and 1935?

The Witness: Well, I started working for Grasselli 1931.

The Court: Well, don't you remember that yourself without somebody marking it on a card?

The Witness: No, I don't remember.

The Court: Mark that, Mrs. Bergen.

(Received and marked Exhibit P-2.)

Q. When you began to work in 1931 in what department did you work?

A. Silicate.

Q. And at the time you were there was George Matey [fol. 117] working also in that department?

A. Yes.

Q. And for how long did you work in the silicate department?

A. Four years I work.

Q. Well, did you ever work in any other department other than the silicate department?

A. Yes.

Q. What other department did you work in?

A. Phosphate.

A. And during the time that you worked in the silicate department what did you do?

A. Washing drums.

Q. And where is that from the furnaces, where the furnaces are?

A. 150 feet about long.

Q. And during the time that you worked in the silicate department was there any dust, chemical dust of any kind?

A. Yes, lots of dust.

Q. And what kind of dust was that, do you know?

A. Soda ash and silica and caustic.

Q. And that was all in the silicate department?

A. Yes, sir.

Q. And when you say there was a lot of dust what do you mean by a lot of dust, do you know what I mean, Paul? [fol. 118] What do you mean by a lot of dust?

A. Well, he cannot come out outside, he have no fan or nothing; he must come out some place, that dust.

Q. And where did this dust come out from?

A. From machine.

Q. And when this dust came out from the machine did any of this dust go where George Matey was working?

Mr. Rudner: I object, that is leading. Counsel has a habit of leading.

The Court: That is leading.

Mr. Rudner: I must suggest counsel do not lead.

Mr. Turtur: I will reframe it.

Q. Where George was working was there any dust or no dust?

Mr. Rudner: Now, if that isn't leading I don't know what is.

A. There was lots of dust.

The Court: That is too leading. You might as well have testified yourself.

Mr. Turtur: Well, if your Honor please, this gentleman is a foreigner.

The Court: It doesn't excuse your testifying. Now we had this witness the last time.

[fol. 119] Mr. Turtur: Very well, your Honor.

Q. Where was this lots of dust that you speak about?

A. Go all dust come for No. 1 furnace, for the metasilicate, for the metasilicate go right through for another room.

Q. Where else was this dust, if any place else?

A. Soda ash.

Q. Soda ash, I know, but whereabouts was this dust, only one place or two places or what?

A. It come lots of dust for the chute.

Q. Chute over the furnaces?

A. Yes, over the furnaces.

Q. And where did George Matey work?

A. No. 1 furnace he working.

Q. And later on did he work at any other numbered furnace?

A. I find him over there working in No. 1 furnace.

Q. And at the time that you found him over there was he always working around the furnaces in the silicate department?

A. Yes.

Q. Now, this soda ash and silicate and caustic that you speak about, was that the dust that was in the place where George was working?

A. Sure.

[fol. 120] Q. You are sure of that?

A. Yes, sir.

Q. And was that a little dust or a lot of dust?

A. Lots of dust.

Q. And that is where George Matey was working?

A. Yes, sir.

Q. Now, with reference to George Matey, did you ever notice anything wrong with George Matey while he worked there? Do you know what I mean?

A. No, I don't know what you mean.

Q. Did anything happen to George Matey when he worked in the silicate?

A. Yes, he cough.

Q. He coughed?

A. Yes.

Q. And what else, if anything?

A. And scratched himself.

Q. Scratched what?

A. Hands.

Q. What was the matter with the hands?

A. For the dust, for the soda ash.

Q. And did you look at his hands, did you look at his skin?

A. Yes, I see him.

Q. And what was the matter, what was on the skin, if [fol. 121] anything?

A. All coming for scratch, for that dust, for soda ash and metasilicate.

Mr. Rudner: Now, your Honor please, this witness cannot conceivably testify to things—he has testified to scratching from soda ash and metasilicate.

The Court: Where did you learn the word "Metasilicate"?

The Witness: I worked over there in the silicate department.

Mr. Rudner: I think, sir, he can testify as to the physical acts he observed but now he is giving the cause as he understands it, which of course involves something beyond the experience of this witness.

The Court: I think so.

Mr. Turtur: Of course, I didn't ask him that, your Honor.

Q. Paul, you said that there was something wrong with the hands?

A. Yes.

Q. On the skin?

Mr. Rudner: Now, if your Honor please, counsel is very [fol. 122] unfair in just telling the witness what he saw.

Mr. Turtur: Now, your Honor please, he indicated that. Just a moment. A witness can be led as effectively by questions as he can by motions.

The Court: Try not to lead him.

Q. What did you notice was wrong with the skin on his hands?

A. All coming for the dust.

Q. I know, but please, Mr. Messaros, you don't know, you are not a chemist. I want to know, if you please, what was wrong with the skin, if anything, on the hands,—what did you see on George while he worked in the department?

A. He scratching.

Q. He scratching. And was there anything on the hands, on the skin when he scratched?

(No answer.)

Q. Do you understand me, Paul?

A. Yes.

Q. Well, please answer, was there anything on the hands on the skin when he scratched?

A. He come like a blood?

Q. It come like blood?

A. Yes.

Q. And you say he coughed?

[fol. 123] A. Yes, he coughed.

Q. And what else did you notice about Matey when he worked in that department, what else besides the coughing and the skin that he scratched, what else, did you notice anything else? Do you know what I mean?

Mr. Rudner: The witness shook his head. The stenographer won't get the answer.

Q. Don't shake your head, just answer, Paul. Do you know what I mean, if there was anything else wrong with him physically?

A. I don't know.

Q. You don't know what I mean?

A. I don't know what you mean.

Q. Well, I asked you, Paul—you said that you saw that this man was coughing, you said you saw that he had a cough.

A. Yes, he has a cough.

Q. And you said he had something on his skin and he scratched.

A. Yes, after a while he scratching.

Q. Now, anything else that you saw about Matey, what else did you see while he worked in the department, if you know? Anything else wrong with him?

A. I know he have a pimple.

[fol. 124] Q. Where was that pimple?

A. On the back.

Q. In the back. And after you saw that pimple in the back where did George go, do you know?

A. He gone home.

Q. He gone home. Do you know whether he went to the hospital?

A. I don't know that.

Q. You don't know. And he was away then after that pimple for how long, if you know?

A. Maybe about two weeks, I don't sure.

Q. You are not sure?

A. I don't sure.

Q. But after he came back in what department did he work in?

A. He come back in the silicate back.

Q. In the silicate department. And when he came back in the silicate department what else did you see, if anything, was wrong with George Matey physically, something wrong with him?

A. Yes, he cannot work.

Q. Why?

A. Cannot work but all the time scratch, sick cough.

Q. All the time scratching, sick and coughing?

A. Yes.

[fol. 125] Q. And that was all the time that he worked in the silicate department?

A. Yes.

Q. All right. Now, you said you also worked in the phosphate department, is that so?

A. Yes.

Q. Do you know whether George worked in the phosphate department too while you were there?

A. Yes.

Q. And what were you doing in the phosphate department?

A. I working in the bin.

Q. What bin?

A. Inside in the bin, in the soda ash, dry soda ash.

Q. Dry soda ash. And when you worked in this bin in the dry soda ash was there any dust there?

A. Lots of dust, lots of dust.

Q. Lots of dust. And where was George Matey working?

A. He working in machines, in rocks, in machines, rock.

Q. And from where this bin was was there any dust that went where George was working.

A. Lots of dust over there.

Q. All the time?

A. Yes, sir.

[fol. 126] Q. All the time that George worked there this soda ash would go over to him?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Was it hot to work there or cold?

A. Hot.

Q. Very hot?

A. Not very hot and not very cold.

Q. And this bin, in this bin where the dry soda ash was, was there any ventilation, any fans to take out this dust?

A. No.

Q. Were there any windows in this bin open to take out this dust?

A. They no allow to open.

Q. Why were they not allowed to open, who said you were not allowed to open?

A. Well, everything fly around that soda ash.

Q. And the windows in there are always shut?

A. Shut them off.

Q. There was no mechanical machine or fan of any kind to take out this dust?

A. No.

Q. And this soda ash, you said there was a whole lot of [fol. 127] soda ash when you worked there and when George worked there?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Now, in the silicate department while George was working there, was there any mechanical fans there?

A. No.

Q. Ventilation of any kind to take out that dust?

A. No.

Q. You are sure of that?

A. I am sure.

Q. Paul, you don't work for the Grasselli Chemical Company any more, do you?

A. No.

Q. And does the fact that you worked with the Grasselli Chemical Company make any difference as to what you say on the witness stand here today? Do you know what I mean?

A. Make no difference, I go only just tell the truth.

Q. You only tell the truth?

A. That's all.

Q. And do you know until what month or year George Matey worked for the Grasselli Chemical Company?

[fol. 128] A. Work, I know it is Chicken Day.

Q. Chicken Day, Thanksgiving Day. You call it Chicken Day?

A. Yes.

Q. What year was that, do you know, Paul?

A. I guess——

Q. Not you guess, I don't want you to guess, Paul; if you know.

A. 1933, I guess.

Q. You are sure of that?

A. Might be that.

Q. Chicken Day in November, 1933?

A. Yes.

Q. That is the month before Christmas?

A. Yes.

Q. You know what month Christmas is?

(No answer.)

Q. You know the month of December?

A. Well, I have no everything mark him up.

Q. Well, I know, but you know that Christmas falls in the month of December, is that so?

A. Yes.

Cross-examination.

By Mr. Rudner:

Q. Mr. Messaros, these dates you testified to here on Exhibit P-2, 1931 to 1935, where did you get those dates?

[fol. 129] The Court: He told us that; don't ask questions, please, that I have already asked, Mr. Rudner.

Q. Excuse me. When did you start working for the Grasselli Chemical Company plant.

A. 1935, I got the lay off.

Q. Did you work there more than once or one time continuously?

A. One time.

Q. Well, now, didn't you really start working in 1929 at the warehouse?

A. No.

Q. Didn't you work in the shipping department for a while?

A. I only just get the transfer order.

Q. How, what's that?

A. I only just get the transfer order.

Q. Yes, you were transferred to the shipping department?

A. I worked in the silicate and I get the transfer for phosphate.

Q. Well, now, didn't you work in the warehouse for a time?

A. I no remember when I work in there.

Q. On August the 12th, 1929, you started working in the warehouse of the Grasselli Chemical Company where you [fol. 130] worked till May 6, 1930, when you were transferred to the shipping department; remember that?

A. I know I get a transfer for phosphate first.

Q. Do you remember working in the warehouse?

A. Warehouse, whereabouts?

Q. Pardon me?

A. I don't remember.

Q. Do you remember when you worked in the shipping department?

A. I don't remember.

Q. When did you go into the silicate department?

A. When I go to start to work for silicate.

Q. When did you start working in the silicate department?

A. 1931.

Q. That's right, February 26, 1931; is that right, early in the winter of 1931?

A. Yes.

Q. Is that right?

A. Yes.

Q. Before you worked in the silicate department where did you work in the Grasselli Chemical Company?

A. I get the job over there in silicate.

Q. Where did you start working?

A. I started over there in the silicate.

Q. Silicate, all right. And how long did you work in [fol. 131] the silicate department?

A. Four years.

Q. How long?

A. It will be four years.

Q. How long did you work in the silicate department?

A. About two years, I guess.

Q. You worked for two years, you guess?

A. I guess, I don't sure because I have a transfer on the phosphate.

Q. Well, when were you transferred to the phosphate department?

A. I have no mark it.

Q. Do you know how many years you worked in the silicate department. Just that, Mr. Messaros.

A. I know when I go over there, 1931, worked over there for the silicate, and I been working about three years, maybe two, maybe three years I working in the silicate and I get a transfer for the phosphate.

Q. Now, didn't you really work for three years in the silicate department?

A. I am not sure.

Q. Now I am going to tell you what the records of the company show and see if you are not wrong.

Mr. Turtur: I object to what the records of the company [fol. 132] show. This gentleman is testifying as to where he worked.

Mr. Rudner: It is cross-examination. I can check this witness on time.

Mr. Turtur: Not by referring to any records that we know nothing about, your Honor please. We don't know who made the records, what records they are, what department they belong to or anything else.

Mr. Rudner: Your Honor please, I am allowed on cross-examination to question this witness with respect to time.

The Court: Certainly, go ahead.

Mr. Rudner: And I am entitled to use the records of the company in determining—

Mr. Turtur: My objection, your Honor, goes to the use of the records.

The Court: I understand; you may have an exception.

Plaintiff's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. The records of the company, Mr. Messaros, show that you worked in the silicate department from Febru- [fol. 133] ary 26, 1931, is that right? Would that be right?

A. Well, I get the job down in the silicate and I work down in the boats, in the shipping dock.

Q. The records—you say you started working in the silicate department in 1931, is that correct?

Mr. Turtur: I object to that. He just stated, your Honor please, "When I got my job I worked down the shipping dock. Then I got transferred to silicate department." That is his last answer.

Mr. Rudner: That is just contrary to what he gave me before.

Q. Now, I am going to ask you again: Where did you start working for the Grasselli Chemical Company, what department, where?

A. Silicate.

Q. I thought you said you worked on a dock and were transferred to the silicate department.

A. Before I working down in the shipping dock, down on a boat.

Q. Now, before you went to the silicate department did you work for the Grasselli?

A. In the silicate I get job over there.

Q. For the first time?

A. Yes.

[fol. 134] Q. All right. Is that correct? You say you worked for the first time for the Grasselli Chemical Company in the silicate department?

A. Yes.

Q. Is that right? If I am wrong, I don't know, you say if I am wrong, just tell me. Where did you start working for the first time for the Grasselli Chemical Company?

A. Down in the silicate.

Q. All right. We will start with that. Now, you started working in 1931 in the silicate department?

A. Yes.

Q. And the records of the company show that you started working in the silicate department February 26, 1913, is that right?

A. Well, I work in a boat.

Q. For what company?

A. Over there.

Q. Grasselli?

A. Grasselli.

Q. Before you went in the silicate department?

A. Yes.

Q. Well, now, I asked you that, you said you started working in the silicate department first; now you tell us where you started working first.

A. I working on the boats.

[fol. 135] Q. The boats, all right. When was that?

A. I cannot tell you.

Q. Was that before you went to the silicate department?

A. Yes.

Q. How long did you work there?

A. As soon as he get a boat in.

Q. How long, how many months, how many days?

A. Well, three days, four days, five days, what time his boat coming, finish boat and get money and get out.

Q. Oh, I see. Then you started working in the silicate department, a regular job?

A. A boat come and I go again in the boat.

Q. For how many months did you do this?

A. About fourteen boat I finish.

Q. Then where did you go?

A. Before I going to get the job exactly in the plant.

Q. Well, you got a job in the silicate department?

A. Yes.

Q. That was 1931?

A. Yes.

Q. Now, the company records show you started working in the silicate department on February 26, 1931. Now, tell [fol. 136] me how long you worked in the silicate department.

A. About two or three years.

Q. How?

A. About two or three years I work in there.

Q. About two or three years, right?

A. Something like that, yes, because I get the transfer for the phosphate.

Q. That's right. Now, you worked for two or three years in the silicate department, then you were transferred, you say?

A. Yes.

Q. What year were you transferred to the phosphate department?

A. I cannot tell you, please, because I have no mark it in my head.

Q. You don't remember?

A. I don't remember.

Q. Now, the records of the company show that you were transferred to the phosphate department on September 5, 1934, is that right?

A. I don't know.

The Court: He doesn't know, he doesn't contradict it.

Q. How long did George Matey work in the *phos*phos- [fol. 137] phate department while you were there?

A. I don't know, about two years.

Q. How long?

A. About two years he worked over there when I knew.

A. Sure.

Q. You mean he worked there two years in the phosphate department?

Mr. Turtur: He said about two years so far as he knows.

Mr. Rudner: I heard what he said.

Q. All right, clarify it another way. You worked about two years as far as you know in the phosphate department?

A. Yes.

Q. When did George Matey stop working in the phosphate department?

A. He worked and stopped in the silicate first.

Q. When did he stop working in the phosphate department, what year?

A. I think 1933.

Q. 1933?

A. I don't sure.

Q. Suppose you look at me, I don't know where you are looking, suppose you look at me.

A. I look for you.

[fol. 138] Q. All right. He worked for you two years in the phosphate department?

A. Not in the phosphate, in the silicate.

Q. How long did he work with you in the phosphate department?

A. I cannot tell you, maybe two or three weeks.

Q. Only two or three weeks in the phosphate department?

A. Yes.

Q. No more?

A. I don't sure.

Q. How?

A. Well, I don't sure he work longer.

Q. Now I am asking you how long while you were working in the phosphate department did George Matey work in the phosphate department.

Mr. Turtur: I object on the ground it has already been answered.

The Court: Read the record on Matey and see if he remembers. Have you got his record in the phosphate department?

Mr. Rudner: Yes, sir.

The Court: Read it to him.

Q. I will give you these facts and see if it will help you. You started working in the silicate department, according [fol. 139] to the company records, on February 26, 1931, and you were transferred to the phosphate department on September 5, 1934.

The Court: Now read Matey's record.

Q. Mr. Matey left the phosphate department and left the company on October 23, 1933, so on those dates Mr. Matey wasn't working in the phosphate department when you were working there.

The Court: Was he?

A. Sure he working.

The Court: Then those records are lies, is that it? Are they?

The Witness: No.

Mr. Turtur: Does your Honor want an interpreter? I have him here.

The Court: He understands all right, I think.

Mr. Turtur: Very well.

The Court: You know you are not helping Matey, if that is what you think you are doing, by not telling the truth.

The Witness: I just tell the truth. I working in the phosphate, maybe I working about two or three months over there, that's all.

The Court: The records of the company that were made [fol. 140] long before this case show that you didn't work with Matey in the phosphate department at all. Do you understand that? Now you are not helping Matey.

The Witness: No.

The Court: That way. Now, what is the truth?

The Witness: He give me transfer again.

The Court: Who did?

The Witness: The boss, the boss give him transfer—George Matey, before he left because he was sick.

The Court: What we are trying to find out is whether you worked with him in the phosphate department, not the other department, the phosphate.

The Witness: That's right, I work in the bin and he work down in the machine on that stone.

The Court: Where is that, in the phosphate?

The Witness: In the phosphate, yes.

The Court: Let me see that record. Where does it show the departments? Where is Matey's record? Where does it show the department? Now look here, Paul, this record [fol. 141] shows that you didn't go from the silicate department to the phosphate department until the fifth of——what is the ninth month?

Mr. Rudner: September.

The Court: —September, 1934, is that right?

The Witness: 1934?

The Court: Yes.

The Witness: What do you mean, started to work there?

The Court: Yes, that is when it says you started to work, it puts down your pay and everything and it says——

The Witness: But I work in the boats before I going to get the silicate job.

The Court: Yes, that's right, but that is in 1931; the record shows that too. Then it shows that you went to the silicate job on February 26, 1931, and stayed there until the fifth of September, 1934, and then you went to the phosphate department and in 1935 you went to the sulphate department.

The Witness: Not sulphate, I get out.

The Court: Yes. Now, that's right, isn't it? This record is right. You got your pay from this record, that is how they paid you?

The Witness: Yes.

[fol. 142] The Court: Paid you more when you went to the phosphate department. Now, the record on Matey shows that he left the company altogether on the 16th of July, 19——

Mr. Rudner: No, October.

The Court: Don't let me read it wrong. What is the seventh month? Get me the right record. Well, he stopped working on the 16th of July, is that right?

Mr. Turtur: Just a moment, your Honor please. Mr. Rudner has stated that the last date according to the record was October 26th.

The Court: He stopped working on the 16th of July, is that it?

The Witness: That's right, 1933.

The Court: Now you see you couldn't have worked with Matey, could you, in the phosphate department?

The Witness: I know when I working and I know he working over there.

The Court: Phosphate department?

The Witness: Phosphate.

The Court: But you didn't go to the phosphate until he had left the company.

The Witness: Well, Judge——

[fol. 143] The Court: Yes, sure. Well, that's all.

By Mr. Rudner:

Q. Mr. Messaros, with whom have you talked about this case?

A. Huh?

Q. With whom have you talked about this case, what people did you talk to about this case?

A. Well, I don't talk for nobody, only just for you.

Q. Only to me. When did you talk to me?

A. What you ask me I tell you.

Q. When I ask you in court, you mean? You never talked to me outside?

A. No, not outside.

Q. Well, what people did you talk to outside about this case?

A. I don't talk for nobody.

Q. How?

A. I don't talk for nobody.

Q. Nobody at all. Did you talk to Mr. Turtur, the lawyer?

A. Sure I talk for him.

Q. Talk to the man next to him?

A. No, only the first fellow.

Q. Only the first fellow, not the fellow next to him?

[fol. 144] A. Yes, I talk for him fellow first time, he came over my house, sure.

Q. Which fellow?

A. In the middle.

Q. You talked to the fellow at the end?

A. No.

Q. Just the first two men. Now, when you started working in the silicate department was George Matey working there then?

A. Yes.

Q. He worked two or three years before you came?

Mr. Turtur: How does he know, your Honor please; I object.

A. I don't know.

The Court: He doesn't know.

Mr. Turtur: He is certainly putting answers in this Gentleman's mouth.

The Court: I sustain the objection.

Mr. Rudner: Your Honor please, on cross-examination I think I am entitled to lead, sir.

Q. Well, was George Matey working there for a long time before you got there in the silicate department?

Mr. Turtur: I object to that. At the best it would be hearsay and your Honor has already ruled——

[fol. 145] The Court: I sustained the objection already.

Q. Well, when you got there George Matey was already working in the silicate department?

A. Yes.

Q. And where did you work?

A. Who, me?

Q. On the drums?

A. On the washing drums.

Q. And was that near the furnaces?

A. It was 150 feet.

Q. From the furnaces?

A. From the furnaces.

Q. Which furnace, No. 1, 2 or 3?

A. No. 1.

Q. Was that in the metasilicate room?

A. Metasilicate all go through.

Q. That was the next room?

A. Yes, it was next room.

Q. You didn't work in the room where there was furnaces?

A. No.

Q. You worked in the next room?

A. Yes.

[fol. 146] Q. Where there were walls and a separate door?

A. I worked over there where metasilicate was making.

Q. That's right, in the next room to where the furnace was?

A. No, George work in next room, I was working in this room, the silicate.

Q. That's right. You didn't work in the same room that George Matey worked?

A. No.

Q. And did you always work in the metasilicate room?

A. Who, me?

Q. Yes.

A. Yes.

Q. You never worked in the furnace room?

A. Some time I go clean up when they are dusty.

Q. On what furnace was George Matey working when you were there?

A. No. 1 furnace.

Q. No. 2 furnace?

A. No, sir.

Q. Did he work on No. 3 furnace?

A. No.

Q. How?

A. No, I don't—no.

[fol. 147] Q. So long as you worked in the silicate department did George Matey ever work in No. 3 furnace?

A. I know he worked in No. 1 furnace.

Q. Did he ever work at No. s 3 furnace?

Mr. Turtur: I object to that unless this gentleman knows.

The Court: I thought he said he did, Matey. Wasn't that in his testimony?

Mr. Turtur: In the first testimony he said not so far as his recollection was concerned; it was No. 1.

The Court: Matey?

Mr. Turtur: That is what this gentleman says.

The Court: What did Matey say?

Mr. Rudner: Never worked in No. 2 after 1930.

Mr. Turtur: He worked in 1 and 2 and in March, 1930, he worked in No. 3. That is what Matey said.

(Recess.)

[fol. 148] Afternoon Session.

Paul Messaros, resumed the stand.

Cross-examination continued.

By Mr. Rudner:

Q. Mr. Messaros, did you work in the metasilicate room all the time while you worked in the silicate department?

A. Yes.

Q. And you never worked in the room where the furnaces were while you worked in the silicate room?

A. I clean up over there.

Q. Oh, you cleaned up in the furnace room?

A. Dust.

Q. How often was that?

A. I cleaned the dust over there.

Q. How often, when?

A. When I have my job over there.

Q. Well, how often would that be, do you know what I mean, when I say how often?

A. I don't understand what he say.

Q. How many times?

A. Couple of times.

Q. Do you know what a couple of times means?

A. Three, four times.

Q. Outside of those three or four times, those couple of [fol. 149] times of which you speak, did you work at all in the furnace room where George Matey worked?

A. Yes, I worked in there.

Q. What did you do in the furnace room where the furnaces were?

A. Well, I clean the dust.

Q. I know that; outside of cleaning the dust did you ever work there?

A. I don't understand.

Q. You said that you worked in the room where the furnaces were a couple of times, three or four times, cleaning the dust. Outside of those times did you work in the room where the furnaces were?

Mr. Turtur: What time, Mr. Rudner, what date?

Mr. Rudner: Any time while he worked in the silicate department.

A. I don't remember.

Q. Don't remember.

The Court: What did you do in the silicate department, what did you do there?

The Witness: I washing drums over there for the metasilicate. They have a job and I go clean the dust.

Mr. Rudner: The witness has testified, your Honor, that [fol. 150] he worked a couple of times in the rooms where the furnaces were, cleaning dust, as I understood it; outside of that he worked entirely in the metasilicate room. I am trying to get him to say if that is correct or not.

The Court: Do you understand what the lawyer is saying to you?

The Witness: No.

The Court: Try him again.

Q. I will try it; now if you don't understand me, Mr. Messaros——

Mr. Turtur: Would it be any service to the court if I gave an interpreter?

The Court: I think he understands.

Mr. Rudner: He understands, he doesn't need an interpreter.

Q. You worked in the metasilicate room washing drums?

A. Yes.

Q. That room was next to the room with the furnaces?

A. Yes.

Q. Is that right?

A. Yes.

[fol. 151] Q. You said yes?

A. Yes.

Q. All right. You worked all the time in the metasilicate room except when you said you cleaned dust in the furnace room a couple of times, is that right?

A. Yes.

Q. Did you work any other time in the room with the furnace?

A. Well, couple of times I work and clean.

Q. Outside of this couple of times did you work in the room with the furnaces?

A. I don't understand what you mean.

The Court: Isn't that a map of the plant there?

Mr. Rudner: We have a chart here. Mr. Turtur, do you want to check that map as to its accuracy or will you take my word for it?

Mr. Turtur: Did you make it?

Mr. Rudner: No, I am a lawyer, not an architect.

Mr. Turtur: Well, you said your word.

Mr. Rudner: I will vouch for the accuracy of the sketch.

Mr. Turtur: Of course, if you say so and will prove it is [fol. 152] such.

The Court: Well, does it look like the plant as you saw it?

Mr. Turtur: I don't know, I just want to take a look at it.

The Court: Now, Paul, look at that map, will you, and then find out where the furnace room is, point out the furnace room.

Mr. Turtur: Your Honor please, as I understand, this map is merely showing the physical location of the various furnaces and the places, so-called soda ash, &c. but it doesn't show all of the various appliances that are being used by way of a sketch.

Mr. Rudner: Oh, you cannot do that.

The Court: It doesn't pretend to.

Mr. Turtur: I mean for instance, over here in the mix room it doesn't show any of the openings here.

Mr. Rudner: You cannot do that.

The Court: Now, you worked, Paul, in the metasilicate room, didn't you?

The Witness: Yes.

The Court: Point that out, is that where it is?

[fol. 153] Q. Metasilicate room up here. Perhaps I might start by saying these here are the furnaces, Mr. Messaros, No. 3 furnace, No. 2 furnace, No. 1 furnace. Here is the mix room. This is the metasilicate room on the top. As I understand, you worked in this room here, this metasilicate room, washing drums except for a couple of times when you worked here sweeping up dust, is that right?

A. Yes.

The Court: Paul, did you do anything else in the furnace room besides sweep up dust?

The Witness: If drums no good silicate, you know, we going to dump that silicate out in a chute.

The Court: Where is the chute, near the furnaces?

The Witness: No. 2 furnace and No. 3 furnace.

Q. Did you work in No. 3 furnace?

A. I no work, I just labor work.

Q. I mean did you work as a laborer near the No. 3 furnace?

A. Yes.

Q. How many times?

A. Couple of times.

[fols. 154-155] Q. Couple of times?

A. Yes.

Q. What else did you do in this room with the furnaces, what else did you do there?

A. Labor jobs, sweep them up dust.

Q. You worked a couple of times sweeping up dust, is that right?

A. Yes.

Q. You worked a couple of times around the No. 3 furnace doing labor work?

A. Labor.

Q. What else did you do in the room with the furnaces?

A. Going to put it in for drums, the silica no good for the drums and we dump them up.

Q. In the furnace room?

A. In the furnace room but in a hole.

Q. In a hole in the furnace room. But most of the time that you worked in the course of a day you worked in the metasilicate room washing drums?

Mr. Turtur: I object, your Honor please. He has answered that so many times.

Mr. Rudner: Suppose he answers it again.

The Court: I think we know that he did, Mr. Rudner.

[fol. 156] Mr. Rudner: All right.

Q. In what room did you see the dust?

A. All over.

Q. How?

A. Silica all over.

Q. Well, now, there are two rooms.

A. Two rooms.

Q. There is the metasilicate room and there is the furnace room; where did you see the dust?

A. Silica and next room.

Q. And when you say the next room, is that the room with the furnaces?

A. Yes.

Q. While you were there what furnace did George Matey work?

A. No. 2 and No. 3.

Q. Number what?

A. No. 2 and No. 3.

Q. No. 2 and No. 3?

A. Yes.

Q. Did he work in No. 1?

A. And No. 1, yes.

Q. So you saw him working on No. 1, No. 2 and No. 3?

A. Yes.

[fol. 157] Q. When was the first time you saw George Matey cough, the first time, what year?

A. Chicken Day.

Q. Now, you didn't get my question. Now, just listen, Mr. Messaros. When was the first time that you saw George Matey cough?

A. Well, I have no mark in.

Q. What did you mean when you said Chicken Day?

A. Well, he left the job.

Q. Oh, he left the job. Is that the first time you saw him cough?

A. Yes.

Q. Now, you are sure you understood my question?

Mr. Turtur: Mr. Rudner, I don't want to be insistent but may I ask your Honor's indulgence, please, to let me ask you once more in view of the fact that I have an interpreter here so that there will be no misunderstanding——

The Court: Did you understand that question?

The Witness: No.

The Court: We will have an interpreter.

Mr. Rudner: May I suggest that counsel didn't urge against me the element of repetition; but when it doesn't please him this is repetition. I don't object to it.

[fol. 158] Mr. Turtur: It isn't a question of repetition, it is a question of making sure the witness understands your questions.

Q. Let me ask you again: When was the first time that you heard——

The Court: Swear the interpreter.

(At this point John Isky was sworn as interpreter.)

Q. When was the first time that you saw George Matey cough?

Mr. Rudner: What is his answer, sir?

The Interpreter: He says he doesn't remember the exact day because he didn't mark it up.

Q. Well, what year, can you tell us what year?

Mr. Rudner: May we have the answer regardless—he is giving the interpreter some answers; I think we are entitled to them.

The Court: You must tell us whatever he says, Mr. Interpreter.

The Interpreter: I do, your Honor. He says——

The Court: Whatever he says, all of it.

A. About a month or two before he left the job.

Q. When is the first time you saw him scratch his hands?

[fol. 159] A. About three or four months.

Q. What three or four months.

The Court: Before he left the job.

Mr. Rudner: I thought that might be his answer but I wasn't sure.

A. About three or four months but I don't know exactly when.

Mr. Rudner: Before he left the job?

The Interpreter: Before he left the job.

Mr. Rudner: Is that his answer?

The Interpreter: That is his answer.

Mr. Rudner: Now, if your Honor please, in view of the nature of this witness' testimony, in view of the facts as they definitely clearly appear with respect to the phosphate department, I move that all the testimony of this witness with respect to the phosphate department be stricken on the ground that he was not employed in the phosphate department at the time Matey was there and could not under the circumstances have seen what he testified about.

The Court: Well, as I understand, the present contention of the plaintiff's counsel is that the injury was a continuing one and began in the silicate department and extended to [fol. 160] the phosphate department.

Mr. Rudner: Very true, sir, but we have this witness not being physically there.

The Court: He was physically in one of the departments, wasn't he?

Mr. Rudner: Well, I am dealing with the phosphate department only. My motion is directed only to the phosphate department because this witness was not employed in the phosphate department when Matey was there because the records show Matey left in 1933. This man didn't get to the phosphate department until 1934.

The Court: I am a little in doubt as to whether he thinks he was employed in the phosphate department at the same time or not; I don't think he was.

Mr. Turtur: May I ask your Honor to permit the question to be asked through the interpreter so that there will be no mistake?

The Court: I don't know whether you want him, Counsel, to contradict the record of the company. I think myself it would be inadvisable to get him to do that.

Mr. Turtur: My understanding, your Honor please——

[fol. 161] The Court: The records were made without any reference to this suit and I should say must be accurate.

Mr. Turtur: I don't know anything about that.

The Court: They are payroll records.

Mr. Turtur: They are payroll records except that this gentleman—he said on direct examination and the information that I had and for which I produced him was that this gentleman not only worked in the silicate department with George Matey but also worked in the phosphate department. Now, if he was confused as to dates, your Honor please, or if he was confused as to his memory——

The Court: Give me those records again. We will try him through the interpreter. I think you are particularly unwise to try to contradict records which were made and there was no reason to make them fraudulent; if they had any reason to make them fraudulent, it would be a different thing.

By the Court:

Q. Now, when, Paul, did you go to the phosphate department—you ask him that—what date?

[fol. 162] A. When they give me transfer.

Q. When was it, what date?

A. I don't remember the date.

The Court: You see, there it is, he doesn't really remember. Now, the records show that he went there on the 15th of September, 1934.

Mr. Turtur: Well, supposing your Honor asks him through the interpreter whether he is certain, definite and positive whether he worked with George Matey in the phosphate department regardless of what the records say.

The Court: If he doesn't remember when he went there how could he possibly remember whether he worked with a man who had left before? I think you are making a great mistake, Counselor. It doesn't impress the jury, I don't think.

Mr. Turtur: A person may not remember the exact date but he may remember whether he worked with anybody or not.

The Court: The record shows, the record was made at the time, there was no reason to falsify it.

Mr. Turtur: I don't say they were falsified but we haven't had an opportunity of going into the records, when they were made or how they were made.

[fol. 163] The Court: If you see fit ask him the questions through the interpreter.

Mr. Turtur: Are you through, Mr. Rudner?

Mr. Rudner: No, my motion, sir, is only——

The Court: I won't rule on the motion until you have asked the question that you insist on asking.

By Mr. Turtur:

Q. Paul, are you sure that you worked with George Matey in the phosphate department?

A. I didn't work with him, I worked alone.

Q. What do you mean by that?

The Court: Well, now, Counsel, please. He has told us accurately as to what happened; yet you are trying to get him to contradict both the records and his own understanding and memory. I don't think that is fair to the witness.

Mr. Turtur: He said, your Honor please, that he worked with the gentleman in the Phosphate department. That is the information I have and that is what he testified to on direct examination.

The Court: He testified to it under your leading examination, yes, that's true.

Mr. Turtur: I asked him in what departments he worked [fol. 164] with Mr. Matey. I didn't ask him a leading question.

The Court: I thought your questions were very leading.

Mr. Turtur: Well, there were two objections at the time but I reframed my questions.

Mr. Rudner: I couldn't stop counsel. On direct examination he asked him what this man was doing but I can contradict him on cross-examination; that is the function of cross-examination.

Q. Paul, did you work with George Matey in the silicate department?

A. Yes (in English), I working in the silicate, yes.

Q. Where George Matey worked?

The Court: Now, just a minute. You insisted on an interpreter. Now, please have the questions asked through the interpreter.

The Witness: Sure, he was work.

Q. All right. Now, will you please ask him did he work with George Matey in the phosphate department.

A. No.

The Court: Motion granted.

Q. Did you see George Matey——

The Court: I have granted the motion, counsel; do you still persist?

[fol. 165] Mr. Turtur: That went to the question, your Honor please, whether he worked with him. Now I ask him whether or not he saw George Matey in the phosphate department. If he did, under what conditions and circumstances he was working. One is as to working with him and the other whether he observed him in that department.

The Court: You mean as a bystander?

Mr. Turtur: No, as one of the workmen in and about that department, because the department is in several places.

The Court: He has already told us that he didn't work in the phosphate department at the time with Matey, that he didn't work with him. Now you want to ask him if he saw him there?

Mr. Turtur: When Matey was there.

The Court: In other words, you want to force from this man, who isn't used to being on the witness stand, who doesn't speak very good English, an admission contrary to what he knows to be the fact. I say again to you I don't think that is fair to your witness.

Mr. Turtur: Well, I don't mean to be unfair.

The Court: Then please don't persist.

Mr. Rudner: I take it that the testimony of this witness [fol. 166] with respect to the phosphate department——

The Court: Is stricken.

Mr. Rudner: —may be stricken?

Mr. Turtur: Exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed *and* accordingly.

William Clark. (Sealed.)

The Court: Is that all Mr. Rudner?

Mr. Rudner: That's all I have.

By Mr. Turtur:

Q. Now, Mr. Messaros, was George Matey working in the silicate department when you first went to work there?

A. (In English.) Yes.

Q. Will you give your answers to the interpreter, please? Now, you said that sometimes you would go and clean up in the silicate department where George was working.

Mr. Rudner: Your Honor please, I object as not being redirect examination. It strikes me as being all over again on direct.

Mr. Turtur: This was brought out on cross-examination.

[fol. 167] A. Yes.

Mr. Rudner: Twice, I think, his testimony was——

Mr. Turtur: He used the words "couple of times" and couple of times to some people may mean many times.

The Witness: I understand "couple of times" as being two or three times.

Mr. Turtur: I will ask it now, Mr. Rudner, if you don't mind.

Mr. Rudner: If you want to clarify it, ask him what he means by a couple.

Q. How many times did you go to sweep up or work around where George Matey was working?

A. If I work days I been going off there very often to clean up.

Q. Well, what did you mean when you said a couple of times?

A. He says he means that during the day he went up there three or four times, that's what he meant, a couple of times.

Q. That couple of times meant each day while he worked there?

Mr. Rudner: I object. That question is very definitely leading.

[fol. 168] Mr. Turtur: That is what he just said.

Mr. Rudner: No, he says a couple of times means two, three or four times.

Mr. Turtur: Do you want to give your interpretation?

Mr. Rudner: No, I object to your giving yours—I beg your pardon.

The Court: Ask him this: when he says a couple of times does that mean a couple of times each month or each week or each day?

A. Three times in each shift.

The Court: What is a shift?

The Interpreter: Eight hours.

The Court: Ask the witness that.

The Interpreter: That is what he said, in one shift.

The Court: All right, I think we understand now what he means.

Q. So that means three times a day?
A. Yes.
Q. Are you sure of that?
A. (In English.) Yes.
Q. Answer the interpreter, please, so there will be no misunderstanding.

The Interpreter: Yes.

Q. Now, when you went to sweep up was there a little [fol. 169] bit of dust or a lot of dust?
A. Way up to the knees.
Q. Way up to the knees?
A. (In English.) Lots.

(Question repeated by the interpreter.)

A. Around the furnace.
Q. Did you ever see where this dust came from around the furnace where you went to sweep?
A. From the top.
Q. What did you use to clean up around where you said you cleaned up?
A. Broom and scraper.
Q. While you were there did the company or any boss at any time ever tell you that this dust was bad for you?

Mr. Rudner: Objected to as not being redirect examination.
The Court: He may answer.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.
William Clark. (Sealed.)

A. No.
Q. Did the company or any boss at any time give you a respirator while you were working in the silicate department?
[fol. 170] A. No.
Q. When you worked in the phosphate department was there a lot of dust there?

Mr. Rudner: I object, your Honor please, on the ground that there is no tie-up between the time this man worked in the phosphate department and the time Matey worked there.
The Court: Sustained.

Mr. Turtur: They say there has no change been made, your Honor please.

Mr. Rudner: I am directing——

Mr. Turtur: Pardon me, Mr. Rudner, I am talking to Judge Clark. Please, your Honor, the reason for pressing my question is that Mr. Rudner specifically stated that there has been no change of any sort made, physically or otherwise. Now, if their contention is that this gentleman, Matey, worked until October of 1933, and we say around November of 1933, and this gentleman worked there thereafter, if there has been no physical change or if there has been no change of any kind, I respectfully submit that we are allowed to prove what the condition was when this gentleman worked there.

The Court: I don't think Mr. Rudner has admitted that [fol. 171] there was no change in dust conditions.

Mr. Turtur: If your Honor please——

Mr. Rudner: No physical change.

The Court: I don't understand he has done that. He just said physical conditions. I guess you will have to show dust in the phosphate department by somebody who worked there with Matey, not by somebody who worked there afterwards. I sustain the objection. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Paul, on the map here, this is No. 1 furnace?

A. Yes.

Q. This is No. 2 furnace?

A. (In English.) Yes.

Q. And this is No. 3 furnace, which is higher than the 2, is that right?

A. Yes.

Q. Now, this is the mix room?

A. Yes.

Q. In this mix room were there any belts?

A. Sure, they goes to a tunnel.

Q. And from those belts was there any dust that came where George was working in the silicate department?

[fol. 172] Mr. Rudner: I object as leading.

The Court: I think it is leading, reframe it, will you, Mr. Turtur. Say it something like "What was the condition."

Mr. Turtur: Very well, your Honor. Thank you.

Q. What was the condition as to these belts when they went around in the silicate room from the mixing room?

A. There was, when it was clear it was pretty good, but when it was rainy or foggy it was pretty bad, soda ash.

Q. Now I am talking about the conveyor belt that came from the mixing room into the furnace room.

A. The belts was carrying soda ash and sand and there was a lot of dust.

Q. And was that the whole time that you worked in the department when George was there?

A. Yes.

Q. Now, from the mix room I note here there is a door. Was that door always open or always closed?

A. The man was closing it when it was too dusty.

Q. And how often was that closed when it was too dusty?

A. Ten or fifteen minutes.

[fol. 173] Q. Now, was there any dust that came out from the mixing room into the furnace room from the doors and from the belts?

A. Yes, when everything was running.

Q. So that when the mixing room runs then the dust does come through the door and the belts, is that so?

A. Sure, it comes.

Q. A little dust or a lot of dust?

A. Lot of dust.

Q. And that dust, with reference to where Matey was working, did that go round where Matey was working, around him?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. Did they have any mechanical devices of any kind to take out the dust that came through from the mixing room, from the door and the belts?

The Court: Mechanical is too big a word, I think.

Mr. Turtur: I mean exhausts of some kind.

A. There was no machine to take that dust out.

Q. Now, with reference to the furnace No. 1, furnace- No. 2 and 3, that part of the plant in the metasilicate department, there is a door here, is that a small door or a large [fol. 174] door?

A. Small door.

Q. And was that door always open or closed?

A. When it is too much dust they try to close it.

Q. And with reference to the door out here leading into the yard from the metasilicate room, that is a large door, is it not?

A. Yes.

Q. And that door was open most of the time, was it not?

A. Open.

Q. Now, with that door open that leads into the yard and the door open that leads into the furnace room, did that cause any drafts when it was open to cause the metasilicate to go around where George was?

Mr. Rudner: Your Honor please, I am going to object to this question because if both doors are open the draft couldn't both come in one direction, it might come both ways; it is asking for a physical impossibility.

The Court: I think you have gone far enough.

Mr. Turtur: The reason for it, your Honor please, is they have introduced this and have shown some doors. Now, in view of the fact that it has been referred to by the [fol. 175] witness, I would like him to explain from what he observed from the metasilicate room into the furnace room——

Mr. Rudner: How about going into the other direction?

Mr. Turtur: Pardon me, please. When these doors were open.

The Court: I sustain the objection.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Now, here in the metasilicate department, or right here next to the furnaces, were there ever any large piles of silicate dust piled there?

Mr. Rudner: Objected to as leading.

The Court: Sustained.

Q. Was there ever any dust or powder ever stored here without being covered?

A. Yes, lots of dust.

Q. And when that dust was there without being covered, was that ever blown around?

A. Wind carries that all over.

Q. And did the wind carry it all over to where George Matey was working?

A. Yes.

[fol. 176] Q. And what kind of powder was that?

A. Soda ash.

Q. And what kind of powder was here stored that you say was there without being covered?

A. Soda ash and sand.

Q. And how about in the metasilicate department, what kind of stuff was there?

A. Soda ash, caustic and metasilicate.

Q. And is that the powder that blew around where George was working?

A. Yes.

Q. And that was during all the time that George worked there that you saw?

A. Yes.

Mr. Turtur: Take the witness.

Recross-examination.

By Mr. Rudner:

Q. Now, Mr. Messaros, when you went in the silicate department the first time in 1931, on what furnace was George Matey working?

A. I didn't remember if it was No. 1 or No. 2.

Q. Well, now, No. 3 started in 1930 and George Matey never worked on No. 1 and 2 after 1930 and you came there in 1931, so isn't it the fact that——

Mr. Turtur: I object.

Q. (Continuing.) —from the time you came there to the [fol. 177] time George Matey left he worked on No. 3 furnace only?

Mr. Turtur: I object to the question. He is making a statement which is not only not in the evidence but he is making a statement voluntarily that this man doesn't know anything about.

Mr. Rudner: The record shows from Mr. Matey's testimony after 1930 he never went back to No. 1 and 2 furnaces.

The Court: Has the witness said that he did, Mr. Rudner: Has he said that he did go back to those furnaces?

Mr. Rudner: No, he said he worked on No. 1 and No. 2.

Mr. Turtur: He said he didn't remember.

The Court: That is what I thought he said.

Q. Let's see what he says. Did you ever see George Matey working on No. 1 and No. 2 furnace while you were in the silicate department?

A. I just saw him on No. 1.

Q. During your whole time that you worked in the silicate department did you see him only on No. 1?

A. For all the time I saw him on No. 2 and No. 3.

Q. Did you see him working on No. 2 furnace while you were there?

[fol. 178] Mr. Turtur: Your Honor please, I don't want to——

A. Yes.

Q. As a matter of fact, the facts are, Mr. Messaros, that after 1930 Mr. Matey worked only on the No. 3 furnace——

Mr. Turtur: I object to the question your Honor please.

Mr. Rudner: Just a moment.

Q. (Continuing.) —and Mr. Matey has testified that he worked only on No. 3 furnace after 1930——

Mr. Turtur: I object to the question.

Q. (Continuing.) Now, having those facts in mind, what do you still say as regards where Mr. Matey worked?

Mr. Turtur: I object to the question, your Honor please, on the ground that it seems to characterize the testimony of another witness. The only thing that this gentleman can testify to is what he knows personally.

The Court: Is it your assertion that Mr. Matey said he worked on 2 and 3, I mean on 1 and 2? I thought he said he didn't.

Mr. Rudner: He did, your Honor please, from 1928 to 1930, some time in March of 1930, and from 1930 on he started to work on the No. 3 furnace. That is the evidence.

[fol. 179] The Court: That is what I thought was the evidence.

Mr. Rudner: That is the evidence. This man only got into the silicate department in 1931.

The Court: I don't see how he could see it.

Mr. Turtur: That is a matter of argument, your Honor please.

Mr. Rudner: And it is a matter of cross-examination and recollection.

The Court: Don't try to confuse this witness by getting him to say he saw him working on a furnace that he said he didn't work on. Let it stand that way, Mr. Rudner.

Q. How did you sweep up this dust that you spoke about?

A. With the broom.

Q. With a broom. Where did you see dust up to your knees?

A. Around the furnaces.

Q. And you swept up dust up to your knees with a broom?

A. We had a scraper.

Q. What is a scraper?

A. Something that pulled with and pushed with it.

Q. And what furnace did you see all that dust?

[fol. 180] A. All around.

Q. What?

A. Around all the furnaces.

Q. Now, Mr. Messaros, how far is it from where George Matey worked on the No. 3 furnace to the door of the mix room?

The Court: You can measure it, Mr. Rudner. We don't need to ask him, don't ask him. We can measure it.

Mr. Rudner: I want his recollection, your Honor please, his judgment.

The Court: Ask him how far he thinks it is.

A. About 150 feet.

Q. How far is it from this door of the metasilicate department to where George Matey worked on the No. 3 furnace?

A. About 140.

Q. 140.

The Intrepreter: What he meant was "Where I was working."

Mr. Rudner: Yes, I understand it.

Q. Now, in the metasilicate room you have a door going outside?

A. Yes.

Q. And you had some windows in the metasilicate room?

[fol. 181] A. Yes.

Q. And you had a door leading into the furnace room?

A. There were doors.

Q. And you say the dust came from the mix room across the furnace room 150 feet to where George Matey was working?

A. Yes, because the doors was open.

Q. That is all.

Joseph Laskoti, called and sworn on behalf of the plaintiff, through the interpreter, testified as follows:

Mr. Rudner: May I ask, your Honor, that we try the witness without an interpreter?

Mr. Turtur: Yes, I am going to do so, your Honor please—yes, I will be very happy to. We won't use an interpreter if it is not necessary.

(The following questions and answers were without the interpreter.)

Direct examination.

By Mr. Turtur:

Q. Where do you live, Joe?

A. 3009 Trembly Point Road.

Q. That is Linden?

A. Linden.

[fol. 182] Q. How old are you?

A. 40.

Q. Did you ever work for the Grasselli Chemical Company?

A. Yes, sir.

Q. When did you start ~~to work~~ for that company?

A. I started working 1922, October 4.

Q. And until——

The Court: Have you got his record, his work sheet? Produce it and show it to Mr. Turtur.

(Mr. Rudner starts to show it to the witness.)

Mr. Turtur: The court said show it to me.

The Court: Show it to both.

Mr. Turtur: You don't mean, do you——

Mr. Rudner: No, go right ahead and see it.

The Court: You agree that that is the time?

Mr. Turtur: Yes, the record shows he started working on October 4, 1922, which is exactly what he stated.

Mr. Rudner: And left when?

Mr. Turtur: I am coming to that, Mr. Rudner. I cannot ask it all at once, you know.

Q. Now, you started to work on October 4, 1922, is that so?

A. Yes, sir.

Q. In what department?

[fol. 183] A. Silicate of soda department.

Q. Silicate of soda?

A. Yes, sir.

Q. In 1922 how many furnaces did the Grasselli Chemical Company have in that furnace room?

A. Two.

Q. What were the numbers of those furnaces?

A. No. 1 and No. 2.

Q. No. 1 furnace, as I understand it, was near the mix room, is that so?

A. Yes, sir.

Q. And No. 2 furnace was the next one?

A. Yes, sir.

Q. Now, until when did you work in the silicate department, please?

A. I worked to 1929, February 4.

Q. February 4, 1929?

A. Yes, sir.

Q. And August 21, 1930 you were transferred to the shipping department as a laborer, is that so?

A. Not me.

Q. That is not so?

A. No, sir, I wasn't no place for that department.

Q. Well, the record of the company is wrong?

A. Yes, sir.

[fol. 184] Q. You are sure of that?

A. I am sure I wasn't no place from 1922 to 1929.

Mr. Turtur: Now, your honor please, if you will pardon me—I am sorry.

The Court: It is all right.

Mr. Turtur: If your Honor please, from this moment on I ask that the records of the company be formally proved, because it shows here in the record as produced by Mr. Rudner there are two separate writings, one where he started on October 4, 1922 and the witness now says that he never worked in the shipping department where, as a matter of fact, the record shows that he worked in the shipping department.

Mr. Rudner: Just a moment. If counsel will only examine the record and see what it shows, the record shows that Mr. Laskoti worked in the silicate department from 10/4/22, which is what he testified to, until January 19, 1929, when he left; that in 1930, for only one day he worked in the shipping department.

Mr. Turtur: I beg your pardon. Here it says here "8/21/30, shipping, laborer"—then they have some more numbers and then "Refused to work in sulphur."

Mr. Rudner: All right, 8/21/30, the same day.

[fol. 185] Mr. Turtur: "Refused to work in sulphur."

A. Not me.

Q. Did you ever work in the shipping room for even one day?

A. No, sir.

Q. Are you certain of that?

A. Not one minute.

Q. Not one minute?

A. No, sir.

Q. Then the record of the company is wrong?

A. Sure.

Mr. Rudner: Mr. High tells me he didn't work, he refused to work.

Mr. Turtur: Then the records are wrong, your Honor please.

Mr. Rudner: The records are right, because it says here "Refused to work in sulphur."

Mr. Turtur: I ask that the records be formally proved at the proper time and no longer be referred to as records of the company without giving me an opportunity to cross-examine.

Mr. Rudner: We will raise that question when we get there.

The Witness: Please, Counsel, could I say anything? I [fol. 186] got a witness, since I started over there, and he proved to me I been working steady there, not no place else.

Q. You have a witness who can definitely prove that you always worked in the silicate department?

A. Yes, sir.

Q. And you never worked in the shipping department as the record shows?

A. Not me.

Mr. Rudner: The record does not show that he worked in the shipping department.

Q. Now, Mr. Laskoti, from the year 1922 to February of 1929, did Mr. Matey go to work for the company?

A. Yes.

Q. And in what department did he work?

A. He worked in the metasilicate of soda.

Q. In the silicate of soda?

A. Yes.

Q. And was that in the same department that you worked in?

A. Yes, sir.

Q. Now, what was your business in that department?

A. I used to work in the mix room, first I started to work in the barrel room by the——

[fol. 187] Q. Please take it slow, please.

Mr. Rudner: If your Honor please, I think the witness' testimony should be limited to the identical time that he and Mr. Matey worked in the silicate department which covers a period of two and a half months.

Mr. Rudner: He can show, your Honor please, just exactly what the conditions were from the time Mr. Matey worked there until he didn't work there any more.

The Court: Yes, all right.

Mr. Turtur: That's all I propose to show, plus the condition of the plant, and as the things will develop.

Mr. Rudner: No, I think counsel should be limited to the time that they both worked there.

Mr. Turtur: But, your Honor, there is nothing to limit until I ask my questions.

Mr. Rudner: You just made a statement of what you were going to do.

Q. Now, Mr. Laskoti, during the time that you worked there Mr. Matey came to work in the same department, is that so?

A. Yes.

Q. Now, where did Mr. Matey go to work?

[fol. 188] A. He started work for labor in the barrel room by the drums, loading cars with the drums and painted drums, then after they put him on a furnace.

Q. What number furnace was it that he worked on?

A. No. 2.

Q. Now, when you worked in the mixing room, was that dusty or not?

Mr. Rudner: Objected to unless it is limited to the identical time that Mr. Matey worked there.

A. It was dusty.

Mr. Turtur: I am referring, your Honor please, from the time Mr. Matey worked there.

Mr. Rudner: But the question isn't so framed, sir.

Mr. Turtur: Mr. Laskoti——

Mr. Rudner: I object to the question. Excuse me.

The Court: To what?

Mr. Rudner: I object to the question unless it is in form limited to the time they both worked there.

Mr. Turtur: I haven't asked anything.

Mr. Rudner: A question has been asked.

Q. Mr. Laskoti, will you be so kind in giving your answers to consider only the time when Mr. Matey came to [fol. 189] work there, until you worked there in February, 1929—will you? That's what I want.

A. I cannot understand you.

Q. The condition of the factory.

A. Yes.

Q. That I am going to ask you about, I mean only from the time in October of 1928——

A. Yes.

Q. —to February, 1929, when Mr. Matey worked there, is the time when you will please give your testimony, will you?

A. I don't get you.

The Court: Stick to two months, see, when you and Matey were there together. Just tell us about that time.

Q. Just from October to February, see.

The Court: When you and Matey were there together. You understand that, don't you, Mr. Laskoti?

The Witness: I can't understand you right.

The Court: Look. All we want to know is what the plant was like when you and Matey were there together, just that short time when you were there together.

The Witness: Just a couple of words, please, I can ex-[fol. 190] plain you right.

The Court: Get your interpreter.

(From this point on the testimony was given through the interpreter.)

A. Just the same as all the time.

The Interpreter: I presume that your Honor is putting the question?

The Court: Ask him this: we only want to know what the plant was like when he and Matey were there, not at any other time.

A. Some time when it was nice, clear weather and the wind took that dust out, it was pretty fair, but when it was cloudy and foggy there was plenty of dust.

Mr. Rudner: I don't think the answer was responsive to the question, because your Honor already directed the witness to do certain things. There was no question to call for that answer.

The Court: Make him understand that we only want him to tell about the time he and Matey were there. Ask him if he understands that.

A. I remember because I break him in. Some day it was pretty good, some day pretty bad.

Q. You broke him in what?

A. For the furnace man.

[fol. 191] Q. And after you broke him in what was the condition of the dust where George was working?

A. (In English) I started to see the stuff come from the mix room and that fly out all over.

Q. The stuff started to come in from the mix room, go into the hopper and then fly out all over?

A. When the hopper was empty.

Q. Now, when this hopper was empty and this stuff would fly all over, would this stuff come down to where George was working?

A. (In English.) From here, yes.

Q. And go all over him?

A. Yes.

Q. You saw that?

A. I see it.

Q. And did that happen to you?

A. Yes.

Q. What kind of powder was that that came out from the hoppers or chutes where you were working?

A. That was mixed stuff, sand and soda ash.

Q. Soda ash and sand?

A. Yes.

Q. Now, what about the dust condition, if there was any, from the mix room into where the furnaces were?

[fol. 192] A. (In English.) Same thing.

Q. Did the belts from the mix room give off any dust?

A. When they started charging the machine and the chains on the gears were loose that they were shaking each other and every time they jerked on the chain it throwed the dust all over.

Q. Now, when you say it threw the dust all over, was there a little bit of dust or a whole lot of dust?

A. If the upstairs was clean there was a little dust but if it was not there was plenty of dust.

Q. And when there was this plenty of dust would that fall towards where you and George Matey were working.

Mr. Rudner: Now I am going to object to all leading questions from this point on. The questions are all leading.

The Court: I don't quite know why it is necessary to elaborate so much on the dust conditions. Nobody denies there was a lot of dust, Mr. Rudner?

Mr. Rudner: Pardon me?

The Court: Are you going to have a witness to deny that there was any dust?

Mr. Rudner: We are going to prove what we conceive [fol. 193] to be the dust conditions and also prove by an expert who made tests the actual amount of dust.

The Court: All right. That took place today, but have you witnesses who will say there was no dust at the time of the alleged injury?

Mr. Rudner: We contend that the tests that were made were made under identical conditions under which this man worked.

Mr. Turtur: That is not answering the question, I don't think.

The Court: Are you going to have oral testimony from other employees or from anyone that there was no dust or very little dust?

Mr. Rudner: We are going to offer testimony, your Honor please, as to what our witnesses observed and that's all anybody can do.

Mr. Turtur: Perhaps I can——

Mr. Rudner: It is all more or less relative. The word "plenty" may mean much or it may mean anything.

The Court: Well, I mean, Mr. Turtur, don't elaborate the dust testimony.

Mr. Turtur: Well, we have the testimony so far that the dust was so heavy that it was like smoke.

[fol. 194] Mr. Rudner: Foggy weather, foggy——

The Court: That is what these men have said but don't keep asking them again.

Mr. Turtur: I am asking when this dust fell in what direction it would fall, whether it would be toward where he was working or whether it would go out the window.

Q. When this dust fell would it come down to where you and George were working or would it go out?

Mr. Rudner: I object as leading. That is absolutely suggesting the answer.

The Court: I think that is leading.

Q. When this dust fell where would the dust go?

A. It was flying all over and fall on the men.

Q. And fell on the men?

A. Yes.

Q. And that was during the whole number of hours that you worked there with George?

Mr. Rudner: I object as leading. I think the question should be asked during what part of the day, if any, this thing occurred.

The Court: Don't lead him.

Mr. Turtur: I don't mean to lead him, your Honor please.

[fol. 195] Mr. Rudner: Every question is leading.

Mr. Turtur: We are trying to get through this case.

Q. Was this condition of dust falling on the men during all the time that you and George worked there or during only some time of the day?

A. Some time it was enough, sometimes just a little.

Q. Well——

Mr. Rudner: That is not responsive to the question.

Q. What do you mean by enough?

Mr. Rudner: That answer was not responsive to the question. The question was directed to the time of day and that was the quantity.

The Court: Repeat the question.

(Question repeated by the reporter.)

A. Sometimes when they started charging a machine it was running by power, by electric, and when it started it was skipping the gears and they were shaking and dust was flying all over, but when the machine was pulling normally it was pretty fair.

Q. Now, how often were these machines in gear that skipped and this dust would come, during the day?

A. I cannot remember exactly how often because I was busy but they may jump up two or three times a minute.

[fol. 196] Q. Now, during the time when you worked there with George did you notice the chute up above the furnaces, No. 1 and No. 2, whether they were tightly closed or whether there was any holes in there?

Mr. Rudner: Object to it as very definitely leading.

The Court: I think it is leading. Now, Mr. Turtur, these witnesses do not need to be led, they are not a bit hostile.

Mr. Turtur: Very well, your Honor, but I want them to understand my questions, that was all.

Q. What was the condition of these chutes or conveyors up above the furnaces when this soda ash and sand and this other chemical that you spoke about was going through?

A. There was no conveyor, only a belt.

(In English.) But upstairs in the tunnel was a belt, wide belt, I don't know how wide, 12 or 14 inches wide, soda ash and sand to the hopper, what used to carry the soda ash and sand to the hopper.

Q. Now, was that belt that you spoke about open or closed?

A. There was enclosed in the front but in the back was the doors open; sometimes it was open, sometimes was closed.

[fol. 197] Q. Now, were there any openings in these belts that you spoke about, these conveyors in these enclosures, were there any openings?

A. Cold weather it was——

Q. And these belts, did they give off any dust of any kind?

Mr. Rudner: Objected to as leading.

The Court: Sustained.

A. I was upstairs——

Q. Just a minute. These belts, how did they work with reference to conditions?

A. From the elevator the stuff was coming on the belt and that belt was carrying the stuff in the different furnaces wherever they went.

Q. Now, where did this chemical fall from that you spoke about before?

A. That was falling in a hopper, from hopper to a furnace and they were making the silicate out of it.

Q. And was that where you and George were working? A. Yes.

Q. Where this dust came?

Mr. Rudner: Oh, he said it fell into the hopper, he didn't say anything about dust; he said it went into the hopper.

Q. When it went into the hopper did it cause any dust [fol. 198] condition of any kind?

Mr. Rudner: I object to that as leading.

Mr. Turtur: Why is it leading?

The Court: You keep bringing the word "dust" into every one of your questions. Now, these witnesses, as I said to you before, are not hostile.

Mr. Turtur: I appreciate that.

The Court: Don't overdo it.

Q. What was the condition when this stuff went into the hoppers?

A. When he was charging the furnace that thing was full and sometimes it got stuck so they had to hit it with a pipe or some kind of handle. When it fell it blows that dust all over the plant.

Q. Now, during the time that we are speaking about did anybody of the company, bosses or any official of the company, ever give you any respirator?

A. No.

The Court: It is conceded, as I understand it, by the defendant that there were no respirators.

Mr. Rudner: In the silicate department, no respirators, that's right.

Mr. Turtur: That is not as I understand it.

[fol. 199] The Court: You just heard counsel concede it.

Mr. Turtur: Just now. No respirators.

Q. Were there any exhaust fans of any kind?

The Court: That is also conceded, as I understand it.

Mr. Turtur: Is that conceded, Mr. Rudner?

Mr. Rudner: That's right.

Q. Now, did you get any rash while you were working there?

A. Yes, I got him.

Q. To what part of your body?

A. (In English.) On the hands and on my face all around and on my leg.

Q. And did you tell that condition or did you show that condition to anybody of the company?

A. I told my boss and he sent me in the First Aid in the plant.

Q. Who was your boss at that time?

A. Bill Linestiff.

Q. They sent you to the First Aid?

A. Yes, sir.

Q. And how many times did you get that rash while you were working around this department?

A. (In English.) I got once pretty bad and after I go to [fol. 200] the First Aid, I don't remember how long but I think about six weeks every day to the doctor.

Q. Every day to the doctor. They gave you treatments, the company doctor?

A. Yes, sir. He left me from the morning to the morning and put some grease on my hand and on my leg and says "Come in tomorrow morning."

Q. And every morning you would report for the skin rash?

A. From this morning to tomorrow, he left me pretty long time, so I see after they didn't help me.

Mr. Rudner: A little louder.

A. Well, I wash him myself because my face looks pretty dirty, he tell me wash it myself. That is why I take private doctor. I left the company doctor and take the private doctor for my side and I had to pay him from my own pocket.

Mr. Rudner: Now, your Honor please, that is not material.

Q. They gave you these treatments every morning, that's so, isn't it?

A. Who?

(Question repeated by the interpreter.)

A. Yes, they give me a treatment by the time I went up to the company's doctor, they give me a treatment.

[fol. 201] Q. Now, you are not working for the Grasselli Chemical Company any more, are you?

A. (In English.) No.

Q. Does the fact that you don't work for the Grasselli Chemical Company make any difference as to your testimony in this court today? A. No, makes no difference.

Q. You only tell the truth?

A. (In English.) I am telling the truth, what I know, what I remember.

Q. Did you speak to anybody about this case?

A. No.

Q. You spoke to me?

A. I speak only to you.

Q. And that was after you gave a statement?

A. You asked me the questions, I told you what I know.

Q. And what you told me was the truth, is that so?

A. Yes.

Q. And that is what was put down in the statement?

A. Yes.

Q. And you signed it?

A. Yes.

Q. (Through interpreter.) Now, when George came to work there, Joe, what was his condition from what you saw in 1928, was he in good health or not?

A. I never saw anything wrong with him; he was pretty [fol. 202] fresh and good man.

Q. Is this the way George Matey looked when he came to work there, showing you Exhibit P-1?

A. Yes, sir.

Cross-examination.

By Mr. Rudner:

(Through interpreter.) Q. Mr. Laskoti, how long did you and George Matey work together in the silicate department?

A. About three or four months together.

Q. And when he first came there was he your helper?

A. When he first come in he was working in the barrel department, not with me.

Q. And then did he work on a furnace?

A. I don't know how long he was working somewhere else but then he was working in the furnace room.

Q. Which furnace did he start working?

A. (In English.) No. 2.

Q. No. 2 furnace. And you worked No. 1?

A. I worked on No. 2.

Q. I see, you worked on No. 2 too.

A. And the boss sent him over to me so I would break him on the job because I don't want that job.

Q. And he continued working on the furnace while you were working on the furnace too?

[fols. 203-204] A. When I quit and he was working alone.

Q. Now, Mr. Laskoti, when did you get this rash on your hands?

A. 1925.

A. And how long did that last?

A. About six months.

Q. And you were working in the silicate department at that time?

A. Yes.

Q. Were you out any time at all?

A. When I had that rash I was out.

Q. How long were you out?

A. I think about 20 days.

Q. Where were you?

A. My own doctor won't let me to go back to work.

Q. I mean you were out 20 days at a stretch in 1925?

A. Yes, sir.

Q. And that is the only time you were out?

A. Yes.

Q. You say you got First Aid?

A. Yes.

Q. And where was that First Aid, at the plant?

A. (In English.) In the plant, yes, sir.

Q. What doctor.

[fol. 205] A. I don't remember his name but I think it was Dr. Hazeltine. I am not sure but I think that fellow was.

Q. I think that is all, Mr. Laskoti.

TONY CHUBA, called and sworn on behalf of the plaintiff, through interpreter, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Tony, how old are you?

A. 40.

Q. Where do you live?

A. 88 Elizabeth Avenue, Elizabeth, New Jersey.

Q. Did you ever work for the Grasselli Chemical Company?

A. Yes.

Q. From what year to what year?

A. I didn't remember but I think it was in 1931.

Q. Did you work there in 1927?

A. (In English.) Yes, I work.

Q. Are you sure?

A. It is about 18 years ago since I first started working for the Grasselli Chemical Company.

Q. And then you went back again?

A. Then I got laid off for about four months and then back again.

[fol. 206] Q. I see. Now, did you work there in the silicate department when George Matey was working there?

A. Yes.

Q. And did you also work in the phosphate department when George Matey worked there?

A. Yes.

Q. Now, during the time that you worked in the silicate department with George Matey what was the condition as to chemical dust?

A. It was bad and some time good.

Q. What do you mean by the word "bad"?

A. When it was a rainy day that the dust don't go up or out, everything inside was very bad.

Q. And what kind of dust was that?

A. Soda ash and dust.

Q. And did you work where George Matey was working on the same furnace?

A. Yes.

Q. And for how long a time did you work with him in the silicate department?

A. About 2 years.

Q. And during the two years that you worked with him in the silicate department what did you notice about George, if you did, as to his health?

Mr. Rudner: Your Honor please, I would like to have the [fol. 207] time fixed. We are just dealing in years without any definite time. The record shows——

Mr. Turtur: I object to the records until properly proven.

Mr. Rudner: This man worked in the silicate department——

Mr. Turtur: Just a minute, Mr. Rudner, I am objecting to the records.

The Court: Let Mr. Rudner finish.

Mr. Rudner: —from September 2, 1931, he started working in the silicate department until 6/1/32, was transferred to sulphide department 5/24/33. There is no record of this man ever having worked in the phosphate department.

Mr. Turtur: I object to the record or to the statement, reading from those records.

The Court: Do you suggest that he did work in the phosphate department, Mr. Turtur?

Mr. Turtur: I don't only suggest it but he stated, sir, that he worked with George Matey in the phosphate department and in the silicate department.

The Court: I don't believe he understands what we mean by the phosphate department.

[fol. 208] Q. Do you know the phosphate department of the Grasselli Chemical Company?

A. Sure, I know.

Q. Did you work with George Matey in the phosphate department?

A. Yes.

The Court: Well, you didn't get paid for doing it by the company, did you?

A. (Continuing.) We were working on the same job only I was working on one shift and George Matey was working on the other shift.

The Court: Then they didn't work together, in any event.

Q. Did you ever work at the same shift at any time in the phosphate department with George Matey?

A. First we was working as laborers on days.

Q. Same shift?

A. Same shift. And then I was working one shift and Matey was working another. That is just like 24 hours, three shifts.

Q. And when you worked as a laborer in the phosphate department with George Matey did you do the same thing as he did?

A. Same job.

Q. And what did you do in the phosphate depart- [fol. 209] ment?

A. We were rolling the barrels and piling the bags and clean up the place.

Q. And what was the condition in that phosphate department where you and Matey were working as to dust?

A. When we were cleaning it was plenty of dust.

Q. And where did this dust come from?

A. From the top.

Q. And what kind of dust was that?

Mr. Rudner: What are we talking about, from the top?

Mr. Turtur: We are talking about the phosphate department.

Mr. Rudner: I am not sure the witness has answered as to the phosphate department. Suppose you find out.

Q. Where did this dust come from in the phosphate department, what part did they call that, in the building?

A. From soda and when we were hoisting the rocks.

Q. Is that phosphate of soda you are talking about?

A. Phosphate soda and dry soda.

Q. Is that soda ash?

A. And soda ash too.

[fol. 210] Q. And where did this phosphate of soda and soda ash come from where you were working?

A. They come in through a chute and goes in the bin.

Q. Is that the bin room?

A. The bin but it spreads all over the dust.

Q. And that bin is right where the vats are where this mud-like chemical is, isn't it?

Mr. Rudner: I object, very definitely leading. Let us have this witness give his testimony.

Mr. Turtur: All right, withdrawn.

Q. Where is the bin with reference to those large tanks or vats where that mud-like chemical is?

A. It is not far away from the small tanks.

Q. And how far away is it?

A. About 40 feet.

Q. And from that 40 feet was there any dust that came from those bins?

A. There always was dust.

Q. That was dry dust, wasn't it?

A. Dry dust.

Q. And is that where that white powder was, in back of where those vats are?

Mr. Rudner: Now, if your Honor please, counsel has got to stop asking these leading questions or I am going to ask for a mistrial.

[fol. 211] Mr. Turtur: I don't mean to do it, your Honor please.

The Court: These witnesses are perfectly willing to say that the place was extremely dusty.

Mr. Rudner: 90 percent of counsel's questions are leading.

Q. What was the color of that chemical?

A. White.

Q. Now, were there any ventilators of any sort in that bin behind these large vats?

A. No.

Q. Were you given any respirators in that department?

A. No.

Mr. Rudner: Object to it, any testimony with respect to these various matters.

The Court: We have had that conceded already.

Mr. Turtur: He only conceded as to the silicate department, not as to the phosphate.

Mr. Rudner: No respirators, but I go beyond that and say this, sir, that this witness is testifying about different shifts. We want the situation——

Mr. Turtur: Oh, no.

The Court: Well, there were no respirators anyway in [fol. 212] the plant, were there, Mr. Rudner?

Mr. Rudner: Only on very special jobs, not in the phosphate department.

Mr. Turtur: Nor in the bins?

Mr. Rudner: This man was never supposed to have worked in the bins.

Mr. Turtur: I didn't ask you that. Were there any in the bins?

Mr. Rudner: Your Honor please, we are entitled to know where this man worked.

Mr. Turtur: He has testified that he worked with George.

Mr. Rudner: In some special bins there were respirators and still are, not where this man worked.

Q. Where you worked, in this bin were there any respirators given to you?

Mr. Rudner: I object on the ground there is no testimony and no association of the fact that Matey was working at this place the same time this man did.

Mr. Turtur: Your Honor please, this whole record this man has been testifying to has been in the phosphate department when he personally worked together with Matey in a laboring job.

[fol. 213] Mr. Rudner: I disagree with that statement.

Mr. Turtur: The record will speak for itself.

Mr. Rudner: Let's find out from the witness. He said they worked on different shifts. Our record shows that the man never worked in the phosphate department except occasionally loaned two or three days at a stretch. This man was never transferred to the phosphate department.

Mr. Turtur: I object to the records unless properly proven. The gentleman has just testified that he worked together with Mr. Matey in that particular department. That is what he has testified to all the time.

Mr. Rudner: I disagree with counsel. The witness has not so testified. He said it for one period but he said they worked in different shifts and mentioned three shifts in 24 hours.

The Witness (in English): Listen——

Mr. Turtur: Just a minute.

The Court: You are going to damage your case in the over-anxiety of your witness.

Mr. Turtur: I am not responsible for what he does, your Honor.

The Court: No, I don't mean that interruption, I mean your whole examination.

[fol. 214] Mr. Turtur: Will you refer to the record——

Mr. Rudner: I suppose I am wrong now?

Mr. Turtur: I have been asking questions always, your

Honor please, as to when this gentleman worked with George Matey in that department.

Mr. Rudner: I move that all testimony of this witness with respect to the phosphate department be stricken.

Mr. Turtur: He said he worked there some of the time.

Mr. Rudner: Let us definitely determine what time he did work there.

The Court: He doesn't remember.

Mr. Rudner: The witness has testified to a whole period of time and the testimony is not fair, not accurate.

The Court: He said he worked some time. You cannot pin him down to the days. Try to find out, if you can do it—after four years, you are good.

Mr. Rudner: I want to save time but I am afraid his testimony is confusing and inaccurate.

Mr. Turtur: May I proceed, your Honor?

The Court: Yes.

[fol. 215] Q. Mr. Chuba, during this time that you worked with George Matey in the silicate department did you notice anything wrong with George Matey about his physical health?

A. When I first started he was all right.

Q. And how long after it was started did you notice anything, if you did?

A. About a year or so later I find out and I see it that he start to cough.

Q. And did that cough disappear while you were working with him or what?

A. That was on continuously.

Q. Did you notice anything else with reference to Matey other than a cough?

A. Cough and has itch.

Q. You noticed that?

A. First on his neck and after on his arms.

Q. Now, were you still working the phosphate department when George finished or when George didn't work there any more?

A. George Matey quit first.

Q. When did George Matey stop working, do you know?

A. In about '33, Chicken Day, Thanksgiving.

Q. 1933, Chicken Day?

A. Yes.

[fol. 216] *A. Yes.*

Q. And Chicken Day, is that Thanksgiving?

A. Yes.

Q. Are you sure?

A. Sure.

Q. Chicken day.

A. One month before New Year's, see, Chicken day.

Q. 1933.

A. Yes.

Q. Sure of that?

A. Yes.

Q. Now, did anything happen to you while you were working there around these chemicals?

A. Yes, sure, bothered me and I had to quit because it cost me about $60.

Mr. Rudner: Object, your Honor please, and move that it be stricken out.

The Court: Out.

Q. Well, I asked you did anything happen to you; never mind whether it cost you anything or not.

A. Yes, I was sick too.

Q. What happened to you?

A. My stomach was bother me.

Q. Anything else?

A. Only the stomach.

[fol. 217] Q. Now, what kind of chemical was in this phosphate department in chicken day 1933 that George and you were working at?

Mr. Rudner: I object to it unless it will be established that they were working together and the exact place be fixed.

The Court: Go ahead.

Q. Where you working in the phosphate department in November, 1933?

A. Yes, in the phosphate department.

Q. You are sure of that?

A. Yes.

Q. And was George working also in the same department?

A. Yes, George was working there too.

Q. And what kind of chemical was that being used where you and George were working there, what kind of chemical?

A. Soda, soda ash and dry soda.

Q. And he said something about phosphate of soda.

A. Phosphate soda, dry soda and some other soda but he don't know the name of it.

Q. But you are sure about soda ash and you are sure about phosphate of soda?

A. Yes, they have three different kinds of soda.

[fol. 218] Q. Now, what kind of chemical was in the silicate department when you worked there?

A. Soda ash and some powder that he don't know the name of it..

Q. What department was next to the furnaces, do you know?

A. There was no exact, only a warehouse.

Q. What kind of powder was that, do you know?

A. Dry soda.

Q. What kind of powder came over from the metasilicate department?

A. White powder from metasilicate; when the machine is running they are grinding that powder and that powder is flying all over the place.

Q. And is that where you and George were working?

A. Yes, all over the plant.

Q. And you understand this is furnace No. 3, this is furnace No. 2 and this is furnace No. 1?

A. No. 1.

Q. This is the mixer room. Now, in this mix room are there any belts?

A. Sure, has got plenty.

Q. And where do these belts go through?

A. Three belts in the furnace room.

Q. And when those belts go around is the atmosphere [fol. 219] clear?

Mr. Rudner: Object to it as leading.

Mr. Turtur: How is that leading, is the atmosphere clear? All right, I withdraw it.

The Court: What is the atmosphere.

Q. What is the atmosphere?

A. Dust is all over the plant. There is boxes on them but those boxes don't fit, you can stick your fingers between it and the dust is flying all over.

Q. Now, this door in the mixing room, was that always closed or open during the operation?

A. Always open.

Q. And does anything come through that door while you people were working there?

A. Always the dust came in.

Q. From the mixing room?

A. From mixing room to furnace room all day.

Q. What kind of dust was that?

A. Soda ash and sand.

Q. Now, with reference to the silicate department and also these tanks, where the tanks are, that is in back of the furnace, as you know?

A. Yes.

Q. Was there a door here and a door here?

A. Yes.

[fol. 220] Q. And were those doors always closed or always open?

A. The doors is always open only when it is raining, then they closed.

Q. And when these doors are open and it is not raining what happens, if anything?

A. When the doors is open the condition is worse because the wind takes all the dust and blows all over the plant.

Q. And is that where you and George were working?

A. Yes, because it takes it towards the furnaces.

Q. Now, did you in the presence of George ever speak to any of the bosses regarding fixing anything in those departments?

A. We couldn't say anything because if we do then the boss say "If you don't like it, get out."

Q. I see. Now——

Mr. Rudner: Your Honor please, I move that answer be stricken out as not responsive. The question was "Did you speak to any boss."

The Court: All right.

Q. Now, did you——

Mr. Rudner: Wait a minute.

Mr. Turtur: I consent; the Judge has already ruled on it.

[fol. 221] The Court: I have stricken the answer out.

Q. Did any of the bosses ever tell you or George to be careful of the chemicals?

A. No.

Q. Did you speak to me about this case?

A. I told him when George sent me there what I know.

Q. You told just exactly what you know?

A. Yes.

Q. And does the fact that you don't work with the Grasselli Chemical Company make any difference as to what you told on the witness stand today?

A. It makes no difference.

Q. Telling the truth?

A. Yes.

Q. And it makes no difference that you don't work for the Grasselli?

A. No.

Q. That is all.

Cross-examination.

By Mr. Rudner:

Q. Mr. Chuba, when did you first start to work for the Grasselli Chemical Company?

A. I can't remember exact day and year, what it was, because it was long time ago.

Q. And where did you work when you first started?

A. First around the sulphuric.

[fol. 222] Q. Sulphuric acid?

A. Yes.

Q. And was that a long time ago?

A. Yes, long time ago.

Q. You mean back in 1919?

A. Might be.

Q. Wasn't that in the lithepon department as pressman?

A. I was working in lithepon too.

Q. As a pressman?

The Court: You are talking about 19 years ago?

Mr. Rudner: Yes, sir. I am going to check this man's record from 1919.

Q. And how long did you work then?

A. About 2½ or 3 years.

Q. That is in the same department?

A. Same department, yes.

Q. That is until about 1921?

A. About till——

Q. That is correct?

A. (In English.) I no can mark.

The Interpreter: In other words, he don't remember.

Q. Is that correct?

[fol. 223] A. He says he is not sure because he ain't got no records.

Q. All right. Then you didn't work there for a long time, did you?

A. He don't know how long he was out because he was laid off.

Q. How many years were you out?

Mr. Turtur: He says he doesn't know, Mr. Rudner.

A. About three or four.

Q. Well, it was eight years, was it not?

A. He says he is not sure about that.

Q. All right. Now, when you came back, the records of the company show you came back——

Mr. Turtur: I object to the records of the company, your Honor please.

Q. (Continuing.) —April 5, 1929. Did you come back to the same department?

Mr. Turtur: Except that the records did show that they were mistaken.

Mr. Rudner: They were not mistaken. You mean in the other gentleman's record?

Mr. Turtur: Yes.

Mr. Rudner: No, I misread them. They weren't mistaken.

[fol. 224] Mr. Turtur: I object to them anyway, your Honor please, and ask an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. I think it is the same.

Q. Same department. And you went back that time as a laborer?

A. Yes.

Q. And how long did you stay in that department in 1929?

Mr. Turtur: What department is that, Mr. Rudner?

A. I am not sure how long because I got laid off again. August 4, 1929, and—no, that's wrong, strike that.

—. You worked as an operator for a couple of years, did you not, in the lithepon department?

A. I was working all over.

Q. Now, after you left the lithepon department you were laid off and you went back to Grasselli?

A. I was out for a little while and then I went back.

Q. Then you went in the silicate department?

A. Yes.

[fol. 225] Q. Now, the record shows that you went back to the silicate department on September 2, 1931, is that about right?

Mr. Turtur: I object to the record, same grounds.

A. I went back in 1931.

Q. And how long did you stay there, about two years?

A. I can't remember exactly, whether it was two years, two and a half or so.

Q. Well, now, I will tell you what the records show and see how near that is correct. The records show that you entered the silicate department on September 2, 1931 and stayed there until April 25, 1933; is that about right?

A. He says "I started to work in 1931 but I didn't remember exactly when I was laid off."

Q. All right. Now, when you started to work in the silicate department what did you do, what was your job?

A. First in the mix room.

Q. First in the mix room. How long did you work in the mix room?

A. About two months.

Q. All right. Then where did you work?

[fol. 226] A. On the presses.

Q. In what room?

A. Upstairs, presses upstairs.

Q. Then where did you work, how long did you work there?

A. I don't know.

Q. And where else did you work in the silicate department—well, did you work in the furnace room at all?

A. Yes.

Q. What did you do in the furnace room?

A. First two weeks I was George's helper in the furnace room and after that I was a furnace man too on the other shift.

Q. What shift?

A. In the other shift.

Q. Oh, not in the same shift with George?

Mr. Turtur: He says "First I was with George and then another shift."

Mr. Rudner: I heard what he said.

Q. And after that you were in another shift?

A. Yes.

Q. How long did you work in the same shift with George?

A. About two weeks, on the same shift.

[fol. 227] Q. You worked two weeks on the same shift?

A. About two weeks.

Q. And what did you do during those two weeks working on the same shift?

Mr. Turtur: Do you contend, Mr. Rudner, the conditions were different from one shift to another?

Mr. Rudner: Just a minute. You have these men working together. It is very peculiar. Let's get it straightened out.

Q. The first two weeks you worked in the silicate department?

A. Yes.

Q. You say you worked as George's helper?

A. Yes.

Q. And of course you worked the same shift, is that right? What shift was that?

A. First week was days; second week was from three o'clock afternoon.

Q. After those two weeks that you worked with George Matey as his helper and worked in the silicate department, did you work in any of the same shifts with George in the silicate department?

A. Later on I was working on the same shift.

Q. Now, you worked two weeks together on the same [fol. 228] shift. How long after those two weeks were over did you work in another shift and George Matey was not working in the same shift with you?

A. I cannot say exactly if it was a month or two or so because they always were changing the men.

Q. All right. Well, have you any idea as to how long you worked?

The Interpreter: He just said about two or three months.

Mr. Rudner: Oh, about two or three months.

Mr. Turtur: After, and then he went back again.

Q. Did you work in another shift after those two or three months were over, did you work in the same shift with George again?

A. Yes, later on because he was working on one furnace, I was working on the other.

Q. On which furnace was George working?

A. When I first started he was working on No. 1 and later on he went on No. 2, and then later on again on No. 3.

Q. How long did he work on No. 1 while you were working there?

A. Oh, just about two months or so.

Q. And then how long did he work on No. 2?

[fol. 229] A. Maybe six or seven months—he cannot say.

Q. Six or seven months on No. 2 and then he worked on No. 3?

A. Yes.

Q. Well, now, I call your attention to the fact that you started working in the silicate department September, 1931, and Mr. Matey started working on No. 3 in 1930 and never went back to No. 1 and No. 2 furnace, how do you check up on that testimony?

A. George didn't go back on No. 1 and No. 2 after that, he went on No. 3.

Q. After he went on No. 3 he never came back to No. 1 or 2?

A. No.

Q. Well, if he started on No. 3 in 1930, that was before you got there in the silicate department?

A. Because that time he was working there.

Q. Now, Mr. Chuba, during the whole time that you worked in the silicate department for the two years, whatever it was, how long did you work on the same shift with George Matey?

A. I don't know but maybe a year or more or less.

Q. Now, after you stopped working in the silicate department where did you go, what department?

A. I went home because they laid me off.

[fol. 230] Q. You went home?

A. (In English.) They have no got job, what do you do, you got laid off.

Q. Well, you were laid off, that's all right. And how long were you laid off?

A. About five or six weeks.

Q. After the five or six weeks did you go back to work?

A. I went back but not on the same place.

Q. Now, where did you go when you came back?

A. Glauber salt.

Q. So after you returned from this five weeks' lay-off you went back to the Glauber's salts department, is that right?

A. Yes.

Q. As a laborer?

A. Yes.

Q. How long did you work there?

A. Seven years.

Q. Seven years?

A. That figures the whole thing, he worked for the same boss seven years.

Q. Now I want to know how long you worked with the Glauber's salts department?

A. Glauber's salts, about four years and the other de-[fol. 231] partment after they laid off, it is about seven.

Q. Well, now, let's see if we can't get it strightened out. You started working in the silicate department on September 2, 1931 and you worked there until April 25, 1933. That is the silicate department.

Mr. Turtur: You have been all through that, Mr. Rudner, without my objecting. Do you want it again?

Mr. Rudner: I have something in my mind so please don't disturb me.

Mr. Turtur: I will disturb you if you are wrong.

A. He doesn't remember exactly but it looked like the fall weather.

Q. You mean you left the silicate department in the fall?

A. It was warm weather yet.

Q. What year, how long did you work in the silicate department?

A. About 2½ years.

Q. All right. You started working in the silicate department in 1931?

A. Yes.

Q. You worked in the silicate department 2½ years?

[fol. 232] A. (In English.) 2½.

Q. That takes us to 1933, that's right.

A. I don't remember all the time.

Q. Well, now, you said you worked two or two and a half years in the silicate department; is that right?

A. I believe it is but I am not sure.

Q. What year did you leave the silicate department?

A. I don't know.

Q. Well, after you left the silicate department were you there two years anyhow in the silicate department?

Mr. Turtur: I object to that, your Honor please. I have been holding my patience here for twenty minutes as to objections but I can't stand it any more and I must insist—he has gotten that answer at least five or six times, your Honor please—two years, two and a half years, four months, always the same kind of questions.

The Court: What does the record show?

Mr. Turtur: The record shows that some time in April, 1933 he left, the gentleman says—perhaps it is so, I am not sure because I don't remember the exact dates, and he has given him that so many times.

[fol. 233] The Court: Let it go at that.

Mr. Rudner: Your Honor please, I am not seeking to be repititious but I will say to your Honor that I have a very definite purpose in mind.

The Court: When he left is now established.

Mr. Turtur: When he left the silicate department.

The Court: Now, what do you want to find out?

Mr. Rudner: Well, this man—I am frank to say to your Honor what I have in mind——

The Court: Yes, go ahead.

Mr. Rudner: I am going to be able to show from this man's own testimony that he couldn't have worked in the phosphate department when Mr. Matey worked there.

The Court: Does he claim he did?

Mr. Rudner: Sure, that is what he said all the time, that after he left the silicate department he went to the phosphate.

The Court: Let's take the two records just as we did before. Now, when did he work in the phosphate department?

Mr. Rudner: We have no record of this man ever having [fols. 234-235] been transferred to the phosphate department, he said he went from the silicate department to the Glauber's salt department.

Mr. Turtur: That is not so, your Honor. He says he worked in the Glauber's salts department around seven years. He has been working for this plant eighteen or nineteen years, as the records show, and as the testimony shows.

The Court: I don't see any statement that he worked in the phosphate department, do you?

The Witness: Yes, I was work there.

The Court: Well, let's see. You find on the record—that is your payroll, do you understand that? Tell him this is your payroll.

The Witness: I won't be ~~able to~~ understand it.

The Court: Yes, you will. Now, don't play that.

The Witness: I can't read.

The Court: You can't read at all?

The Witness: No, nothing.

The Court: I will read it to you. Read the dates to him, when he worked and where.

The Witness (in English): I worked.

[fol. 236] The Court: Wait a minute.

Mr. Rudner: The record shows that he started working for the Grasselli Chemical Company some time in 1919. There is a question mark for the day he started in the lithepon department as pressman and worked there until March 3, 1919. The reason was "Shutdown, power house trouble."

Mr. Turtur: There certainly is some discrepancy in these records, your Honor please, because this gentleman most affirmatively stated that they worked in these respective departments and the record says something else.

The Court: I don't think they consciously lied but I think they are trying to please you by saying that they worked in the wrong departments.

Mr. Turtur: I beg your pardon, sir. I didn't ask these people to please me, I am only asking as to where they worked.

The Court: And I think they were mistaken. The records are not self-serving and why you should cast them on them I don't understand.

Mr. Turtur: The records may show one thing, your Honor please, but this gentleman has stated so many times——

[fol. 237] The Witness: I didn't sign this.

The Interpreter: That is not his signature.

The Witness: Not his, no can sign it.

The Interpreter: It doesn't even look like his, it must be somebody else's.

Mr. Rudner: What did he say, Mr. Interpreter? Did he say he did not sign that?

The Court: Is that what he said?

Mr. Rudner: He has corroborated most of these details with respect to dates, as to the lithepon, showed that on 5/5/27 he went back to the lithepon as pressman where he worked until December 13, 1920, laid off lack of work.

Mr. Turtur: May it please your Honor, in a statement made by Mr. Rudner he stated to your Honor and the jury that he might have been lent to the phosphate department for two or three days or two or three weeks at a time.

Mr. Rudner: I didn't say weeks.

Mr. Turtur: Well, then, two or three days, whatever you said. Bring your daily records. Surely that record is wrong because you have a signature on there which purports to be his and the man don't know how to read or write.

Mr. Rudner: It shows also here that he worked from [fol. 238] April.

Mr. Turtur: I object to any reference to the record on the ground that it specifically shows it is not his record.

Mr. Rudner: It is not his record?

Mr. Turtur: It is not his signature. Prove it.

Mr. Rudner: It shows he worked from April——

Mr. Turtur: I object, your Honor please.

Mr. Rudner: Does your Honor want me to read the record?

The Court: No.

Mr. Rudner: Pardon me.

The Court: Counsel objects.

Mr. Rudner: Then may I continue my cross-examination, sir?

The Court: Yes, please do.

By Mr. Rudner:

Q. Mr. Chuba, is your name Tony Chuba?

A. Yes.

Q. Were you born in Austria—Poland?

A. Yes.

Q. Did you live in 86 South Park Street in 1919?

A. Yes, sir.

The Court: Well, I don't propose to sit here and have [fol. 239] that gone through with.

Q. All right. Now, is it true that you started working in the silicate department in 1931?

A. In silicate department, I was working just on the one time.

Q. 1931. Now, tell me how long you worked there.

The Court: I thought the dispute was about the phosphate department.

Mr. Rudner: I want to lead up to that, your Honor please.

Mr. Turtur: That is the thing I object to. He has had it six or seven times.

The Court: I don't see why you claim that these records are inaccurate, Counselor. I don't think these men mean consciously to contradict them.

Mr. Turtur: But, your Honor, they are certainly referring to something which is contrary to what this gentleman says.

The Court: You said, "Didn't you work in the phosphate department with Matey." He thinks that will help Matey in some way.

Mr. Turtur: That is not a daily report as to where he worked.

The Court: It is their payroll

[fol. 240] Mr. Rudner: Every department this man ever worked, every employee.

Mr. Turtur: This payroll record shows distinctly, it is entirely different from what Mr. Rudner told your Honor and the jury, that at times they would lend him to the phosphate department for two or three days.

Mr. Rudner: He was never transferred to the phosphate department.

Mr. Turtur: No, but he was working in the phosphate department.

The Court: Why don't you call some people who were working there according to the record?

Mr. Turtur: Well, this gentleman was working there.

The Court: According to the records.

Mr. Turtur: I don't know what their records show; I can only take the testimony of this gentleman.

Mr. Rudner: Want to see the record?

Mr. Turtur: Those are not his records; you have a signature on there that is not his.

Q. Is your wife's name Agnes?

Mr. Turtur: I object to what his wife's name is.

A. (In English.) Yes, it is Agnes.
[fol. 241] Q. Can you write your name?
A. No.

Mr. Rudner: I am informed it is signed by a clerk. One of them has a cross at the bottom signed by a clerk, Mr. High tells me.

Q. Now, tell me how long you worked in the silicate department.

Mr. Turtur: I object to it, your Honor please.

A. (In English.) I don't know, see. You no can stay over here five or six weeks in this case.

The Court: Now, let me see. How long do you think you worked in the phosphate department, how long?
The Witness: Two years, maybe more, I don't remember.
The Court: You worked for two years; you worked there in the phosphate department for two years?
The Witness: I was working in the silicate but I was sent very often in the phosphate and back and forth.

Q. What to do in the phosphate?
A. In the bin, dumping the soda.

The Court: What did you do with the soda?
[fol. 242] The Witness: Put it on the belt and the belt is carry it into barrels and boxes and they will fill it up.
The Court: I suppose the fact is he was sent there to do odd jobs. Now let it go at that.

By Mr. Rudner:

Q. How long did you work in the phosphate department?

The Court: Mr. Rudner, he said he didn't work there; he said that he was sent there from time to time.
Mr. Rudner: Well, your Honor please, the witness in direct examination gave the impression very definitely to me, and I presume to the jury——
The Court: He has corrected it now; he didn't work there regularly.

Q. When did you work in the phosphate department, what year?

The Court: He never worked there, he told us that. He told us he never was regularly employed there. He said he was in the silicate department he went there from time to time to do odd jobs and I suppose that is a fact.

Q. How often did you go to the phosphate department?
[fol. 243] A. Some time every week, some time couple of days in a month, depends what kind of jobs they have.

Mr. Rudner: You see, your Honor please, on direct examination——

The Court: Well, now, we have corrected it. We have cleared it up. If counsel for the plaintiff tried to give the impression he worked there all the time he was wrong.

Mr. Turtur: No, I did not, your Honor please.

The Court: I say if you did, I didn't say you did.

Mr. Rudner: May I ask this, your Honor? I want to conclude as promptly as I can.

By Mr. Rudner:

Q. Mr. Chuba, tell me in what year you first went to the phosphate department.

A. I don't remember exactly.

Q. All right. You worked with Glauber's salts?

A. Yes, sir.

Q. Was that before you went to the phosphate department or after?

A. That was the first.

Q. Glauber's salts?

A. Glauber's salts.

Q. You mean you went to Glauber's salt department be-
[fol. 244] fore you went to the phosphate department?

A. First in the silicate and then in the Glauber's salts.

Q. And how long did you work in the Glauber's salts department?

A. I didn't remember exactly, three or four years.

Mr. Rudner: Now, you see, your Honor, the witness——

The Court: Mr. Rudner, I don't want to seem captious but I do think we have got at the facts. Now, why do you embroider them?

Mr. Rudner: This becomes important in this respect. May I just make this statement? The record shows that the man worked in the Glauber's salts, started there on 10/11——

The Court: He doesn't pretend he didn't does he?

Mr. Rudner: All right, we will leave that point then.

Q. Now, you were asked whether you spoke to your boss about anything but it wasn't followed up as to whether you did speak to the boss and what boss. I am asking you what boss you spoke to about dust.

Mr. Turtur: Your Honor please, that is the answer that Mr. Rudner moved to strike out because the answer was—pardon me——

[fol. 245] Mr. Rudner: Yes, your Honor did strike it out.

Mr. Turtur: Just a minute, I didn't get through addressing the court, if you don't mind. That is the answer that Mr. Rudner moved to strike out when this gentleman stated "What is the use of telling the boss because if you complain you are sent home, get fired." Then he moved to strike it out and I consented it be stricken.

Mr. Rudner: Yes, and counsel wasn't fair enough to follow that up and get the true answer. I want the true answer. That is why I am asking the question. Counsel is very unfair in not pressing that question.

The Court: He did speak to his boss. What are you trying to find out, whether he did speak to his boss or didn't?

Mr. Rudner: Yes, sir.

The Court: Which do you want to know?

Mr. Rudner: I want to know to what boss he spoke.

The Court: He didn't speak to any boss apparently because he would have got fired if he had.

Mr. Rudner: I want to know if he did speak to any boss.

[fol. 246] The Court: He said he didn't and gave his reason and I struck it out.

Mr. Rudner: If that is the conclusion——

The Court: That is my recollection.

Mr. Turtur: At the motion of Mr. Rudner.

Q. This bin in the phosphate department, where is that, what part of the room?

A. I was working in the phosphate in the bin, in the soda ash, and many time- my nose was bleed.

Q. I want to know where the bin was that he was talking about.

The Interpreter: I asked him but he tells me different so I have to tell the way he said.

A. The bin was next to the silicate department.
Q. The bin was next to the silicate department?

Mr. Turtur: The question was, your Honor please, where was this bin in the phosphate department.
Mr. Rudner: That is the question I am asking him.

Q. Where was this bin in the phosphate department that you speak about?
A. Not far away from the furnace.
Q. From the furnace?
A. Not far away from the furnace.
[fol. 247] Q. What furnace?
A. Not far away from the furnace and driers.
Q. Is that the phosphate department or the silicate department?
A. I don't know where that belongs, if it is phosphate or silicate.
Q. All right. Now I want to ask one question, I am just about finished. Mr. Chuba, tell me when you got sick at your stomach?
A. When I was working in silicate.
Q. And how long were you sick?
A. Three weeks I was in the bed and then I had to pay my own doctor.
Q. You were at home for three weeks?
A. Yes, sir.
Q. That's all, Mr. Chuba.

Mr. Turtur: That's all.

John Andricik, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Mr. Andricik, where do you live?
A. Linden, 23 East 19th Street.
Q. How old are you?
A. 34.

Q. Let me ask you, please: Is George Matey any re-[fol. 248] lation of yours?

A. He married my aunt.

Q. He married your aunt?

A. Yes.

Q. And how long do you know George Matey?

A. I know George about 11 years.

Q. And before 1928 or rather in 1928, when you went to work for the Grasselli Chemical Company, what was the state of his health?

A. He was in good healthy condition.

Q. This picture, P-1, which was hanging on his wall and now in evidence, does that correctly and truly represent his condition as he was in 1928?

A. Yes.

The Court: Oh, now you said this man would lose his job if he wasn't called tonight.

Mr. Turtur: I will hurry it through, your Honor.

Q. Did you work for the Grasselli Chemical Company?

A. Yes, I did.

Q. And did you work in any of the departments where George worked?

The Court: Let us have his record now. Have you got it, Mr. Rudner?

Mr. Rudner: No.

Q. What were you doing for the Grasselli Chemical?

[fol. 249] A. I was working in a couple departments in Grasselli Chemical Company, I worked in barium products, lithepon department, barium chloride.

The Court: Did you work in the silicate or phosphate?

The Witness: Phosphate I worked.

Mr. Rudner: I have his record; he never worked silicate or phosphate.

The Witness: Phosphate I work, yes, sir.

The Court: When do you think you worked in the phosphate department? The company's record says you didn't.

The Witness: I did, six weeks; barium products was shut down, they got one department there was shut down and I worked six weeks on silico fluoride tanks.

The Court: In the phosphate department?

The Witness: Phosphate department, yes, sir.

The Court: Look in the record.

Mr. Rudner: I cannot find it, your Honor.

The Court: What date was that?

The Witness: I don't know the date.

The Court: What is it, barium products, is that where you say you worked?

[fol. 250] The Witness: Yes, barium products.

The Court: Now, you began working, according to this, in the barium products on the 19th day of September, is that correct, September, 1933?

The Witness: I think so.

The Court: When did Matey leave the plant?

Mr. Turtur: November, 1933, your Honor.

The Court: All right. Now, you began working in the barium products in September, 1933. Now, do you say that the barium products was shut down and that you worked in the phosphate department?

The Witness: Phosphate department.

The Court: Between September and November, 1933?

The Witness: Yes, between those.

The Court: How long, six weeks, do you say?

The Witness: Yes, six weeks.

Mr. Turtur: And he was also a rigger there, your Honor please. Does that record show it?

The Court: Rigger where?

Mr. Turtur: For Grasselli.

The Witness: They got C & R Department, laborer and [fol. 251] rigger together. I worked about nine months, I don't know how long, rigging gang.

Mr. Turtur: And they also had various other occupations.

Q. All right. Now tell us about the phosphate department.

A. Phosphate department I was working like silico fluoride operator; they had their small mill; they grind barium rock on that mill. That makes too much dust and they had soda ash stock tank, couple of thousand ton maybe got in that tank, and we have to go up and down in couple of times and hit that thing.

Q. Do what to it?

A. Hit it so that the soda ash fall down, because they had suction pipe in it and we have to make—they had an open hole and sometimes stuck up, you know, that tank, and we have to hit it. I don't know how many times we have to go up and down the steps and that soda ash fall down, and when it fall down it come all around the plant. They had chutes, six or seven soda ash tanks, what they make soda ash liquor in them tanks. They put on a scale first from that big tank, that soda ash, and at the top they got a chute. That make dust too all over when we put them soda ash tanks.

[fol. 252] Q. Now, when George was working in the phosphate department were you also working there?

A. I cannot tell you, I was working there long, maybe I see him two or three times.

Q. You saw him two or three times?

A. I saw him two or three time he was working there.

Q. And during the time that you saw him in the phosphate department what was the condition as to atmosphere in the department where he was working in the phosphate?

A. It was dusty all the time.

Q. What kind of dust was it?

A. Soda ash and that barium from barium rock dust.

Q. Any phosphate of soda?

A. No, phosphate too because that carries all over.

Q. Where does the dust come from?

A. It comes from mill, they grind the barium rock and from these big hoppers they was all over, holes all around.

Q. Is there a bin in back of those large vats, in back of the phosphate department?

A. We call that in stern, that bin.

Q. And does that bin give off any fumes or chemicals of any kind?

A. Yes, when mens work and dig down there they put on [fol. 253] a belt, that belt carry it; they got nothing to take that dust, that dust goes all over from that bin.

Q. Where the men are working?

A. Yes.

Q. What is the condition of George Matey today in so far as your observation is concerned?

A. Well, he is in very bad condition, I don't know.

The Court: We know that.

Mr. Turtur: Cross-examine.

Cross-examination.

By Mr. Rudner:

Q. You and Mr. Turtur have been doing a lot of work on this case together?

A. Never.

Mr. Turtur: Your Honor, I ask that be stricken from the record and for Mr. Rudner to apologize to me because the only time I spoke to this gentleman was when I came in the court room.

Mr. Rudner: This man?

Mr. Turtur: And I have gone nowhere with him except when he assisted me in making an examination of the plant.

The Witness: That's right.

Mr. Turtur: I don't want any wrong impressions.

[fol. 254] Mr. Rudner: I am not trying to give any wrong impressions, I just want the facts.

Mr. Turtur: And the reason, your Honor, you permitted me to take him along was because we wanted to show where George Matey was working.

Q. You have been working helping Mr. Turtur on some phases of this case?

A. No, I wasn't helping him.

Q. You went out to the plant?

The Court: We have heard——

Q. When did you say you worked in the phosphate department?

A. 1933.

Q. What month?

A. I don't know what month exactly, I cannot tell you what month but barium products shut down, they just run temporary, barium products.

Q. Was it summertime, spring or fall?

A. It was summertime.

Q. 1933?

A. 1933.

Q. How long was that?

A. For six weeks I work in phosphate.

Q. What part of the plant did you work?

A. Silico fluoride tanks and soda ash tanks together.

Q. Now, where was that part?

[fol. 255] A. That is on the left.

Q. Just a moment. With respect to where they dump the phosphate rock in the chutes?

A. They dump on the righthand side of me to the chutes and goes to the drier and to the mill; they grind that rock.

Q. How far away from where you worked?

A. About 50 to 80 feet.

Q. Is that inside the plant?

A. That is inside the plant, when it goes on the drier and the mill, but they don't outside.

Q. Were you working outside or inside?

A. I was working inside.

Q. You were working inside. And how far were you working from the vats?

A. From what?

Q. How far away were you working from the vats?

A. How far from the vats?

Q. Yes.

A. I don't know, I can't tell you.

Q. Do you know where the vats are?

A. Tanks, you mean?

Q. I mean tanks, do you know where they are?

A. Sure, right by me, tanks.

Q. Oh, the tanks are right near you?

[fol. 256] A. Right near me, yes.

Q. After you got through working in the phosphate department where did you go?

A. After I through phosphate department I went back, they start barium products, I went back to barium products.

Q. How long did you work in the barium products?

A. I don't know how long, it is two or three times they stopped there.

Q. I mean how many years, a year or so?

A. About a year, maybe not even that much.

Q. Where was George Matey working while you worked in the phosphate department and was he working the same shift you were working?

A. Yes, I was working same time; when I had a day shift he was working all the time day; when I see him I see him about three times.

Q. All right, you say you worked for about six weeks in the summer of 1933?

A. Yes.

Q. You didn't work any time in the fall?

A. No, not in fall, summer.

Q. Did you work there in September, 1933?

A. Maybe September, maybe October, I cannot tell you.

The Court: What is your idea of summer, Mr. Witness?

[fol. 257] The Witness: It was warm, it wasn't cold yet.

The Court: You know what summer means, it doesn't mean fall?

The Witness: Well, then, maybe it was fall, I don't know.

The Court: Are you sure you worked there at all?

The Witness: Yes, I worked there.

Q. Was it the springtime, was it the summertime, was it the fall?

A. It was fall because springtime we get started barium products and ran couple of months, and after they stopped they sent me over to phosphate.

Q. It was fall. What months in the fall?

A. I don't know.

Q. Was it before Labor Day or after Labor Day?

A. I don't know, I cannot tell you what month it was.

Q. Are you sure it was in the fall? It might have been in the summer.

A. No, it was fall because springtime they run and they run for about five or six months.

Q. Now, when you worked in the barium products what was your job there?

The Court: I am not interested and the jury is not interested in this man's activities. [fol. 258]

Mr. Rudner: Well, your Honor, I have this man's records there.

The Court: You might get them more elaborated.

Mr. Rudner: We will do that.

The Court: And then we would be able to tell. He doesn't remember when he worked there, so far as I can make out. You had better substantiate those records.

Redirect examination.

By Mr. Turtur:

Q. Just a moment—I beg your pardon——

The Court: I am in no hurry, I though- you wanted him to get away.

Mr. Turtur: No, I failed to ask him, your Honor please, anything about the silicate department, if you think we need any further corroboration.

The Court: I don't think so.

Q. I would just like to ask him: Do you know, Mr. Andricik, what month of 1933 Mr. Matey left the job?

A. I know good what month he left the job, November of 1933.

[fol. 259] Q. How do you know good?

A. I know good because he used to come to my house sometimes to see me, I go to see him; we don't live far from each other.

Q. You are sure it was in November?

A. Yes.

Q. What was his condition when he left in November, 1933?

A. He come to me, says "I am sick."

Mr. Rudner: I object.

Q. Not what he said, what did ~~you~~ see his condition to be?

A. It was bad.

Q. And did you work there any more?

A. No, I didn't.

Recross-examination.

By Mr. Rudner:

Q. What part of November?

A. The last part of November.

Mr. Rudner: Now, the records of the company show that he left in October, 1933.

Mr. Turtur: I object to the records; that record is full of holes.

The Court: He isn't offering it, he is quoting it.

[fol. 260] Mr. Rudner: May I have an answer to that question?

Q. Does that help you at all with respect to the time, Mr. Andricik?

A. What is it?

(Question repeated by the reporter.)

A. No, no, he left in November.

Mr. Turtur: I have no further questions.

Q. You worked in the acetate of lead department?

A. Yes, three years.

Q. In the lithepon department?

A. Yes.
Q. That is all.

The Court: Bring all your doctors tomorrow.

(At this point an adjournment was taken to Friday, June 12, 1936, at 10:30 A. M.)

[fol. 261] Friday, June 12, 1936,
10:30 A. M.

(Case continued.)
Appearances as before.

The Court: All right, Mr. Turtur.
Mr. Turtur: Your Honor please, I sent for Professor Gettler early this morning and I am waiting for him every moment.
The Court: Put on another doctor.
Mr. Turtur: I want to give the sequential——
The Court: Put on another doctor and proceed.
Mr. Turtur: Very well.

Stephen Steele, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Doctor, you are a practicing physician of the State of New Jersey?
A. Yes.
Q. And have been so for how long?
A. I am practicing in Linder for the last ten years.
Q. Where did you graduate from?
A. The University of Buda Pesth, Hungary.
Q. And when did you graduate from the University of [fol. 262] Buda-Pesth?
A. In 1918.
Q. Are you connected with any hospital institutions?
A. Yes.
Q. Which are they, please?
A. Alexian Brothers Hospital, St. Elizabeth Hospital, Rahway Memorial Hospital.

Q. And in what capacity are you connected with these hospitals, please?

A. Well, I am on the staff and on the dispensary staff.

Q. And did you in your professional career have occasion to examine and to treat George Matey?

A. Yes.

Q. When did you first see George Matey?

A. Well, I knew him for quite a while because I took care of some younger members of his family. That was back around, let's see, 1930, when I first met him, and I treated him in 1931. He complainted at that time of headaches and dizzy feelings. I treated him for a while and about two or three weeks or so, then I didn't see him again; I saw him again in 1934.

Q. And when you saw him again—pardon me—Doctor, did he have a cough in 1931?

Mr. Rudner: Your Honor please, I think that question is [fol. 263] leading. I think this doctor can testify to what he observed and what he saw.

The Court: Please don't lead him.

Q. I am sorry. What part of 1931 was it, Doctor?

A. I couldn't tell you that.

Q. You don't remember?

A. I couldn't tell you that.

Q. Well, you saw him again in 1934?

A. Yes.

Q. And what did your examination reveal in 1934?

A. Well, he complained of cough, expectoration and pain in the side and general weakness.

Q. Pain in what side?

A. I can't remember that.

The Court: If this doctor is only to testify that Mr. Matey is very ill, we already know that, it is conceded.

Mr. Turtur: I wanted to ask his opinion too, your Honor please, by asking what the condition he is suffering from is due to.

The Court: Ask him that.

Q. Now, Doctor, assuming that Mr. Matey for many years prior to 1928 was in good health and worked every day and without complaints; assuming that in 1928 he went to work for the Grasselli Chemical Company as a helper first and then as a furnace man, and about this furnace or [fol. 264] furnaces in the silicate department in the plant there was a heavy amount of soda ash and sand and silicate dust that he was forced to inhale and be exposed to, and that this condition existed almost daily but more so when they had inclement weather than at times of clear days; that from 1928 to 1930 about he did not feel any ill effects of any sort until some time in 1931 when, as he says, he had a pimple in the back of the neck; that during the course of his work there was a tremendous amount of heat being thrown off from these furnaces and he perspired very much, so much so that his shirt became almost saturated, the same as water, after working around that condition in the summertime, especially, after five minutes' exposure; now, in 1931 approximately he got this pimple in the back of the neck which subsequently turned out to be — carbuncle, and he went to the plant physician and the plant physician suggested or gave him a slip to go to the general hospital to be operated on or to be treated for it; that as a result of this examination he was operated on for a carbuncle and after the carbuncle operation he remained away from his job for approximately two months; that he again went back to the silicate department and was again subjected to the fumes and to the inhalation of these chem- [fol. 265] ical substances of soda ash and sand and silicate; that some time in the latter part of 1931 he developed a cough, an irritating cough, and started to get pain to the right lung region and to the back in the right side of the lung region, and also had an irritating skin, so-called dermatitis, and that whenever he was exposed to these fumes he would have to scratch or did scratch the parts of his skin that were exposed to this chemical——

Mr. Turtur: I lost my train of thought.

The Court: I don't wonder that you did.

Mr. Turtur: Well, your Honor, I have to give the whole facts.

The Court: No value in a question of that kind. What does this man know about the effects of soda ash upon the membrane of the lung? It doesn't appear that he has any knowledge of it.

Mr. Turtur: Well, I am putting him the question.

The Court: What does he know?

Mr. Turtur: He has been a physician practicing since 1918.

The Court: You didn't qualify him with respect to—have you ever had a case like this before?

[fol. 266] The Witness: No, not exactly the same. I have seen cases similar to this but not exactly the same. I have seen abscesses of the lung but they were entirely different, more acute. They came suddenly and the patient would get very sick and die in a short period of time. I remember a case I saw, it was very similar to this, only it was a more acute case. This is chronic, keeps on for years and years.

Q. Well, did you make any study of chemical substances of any kind while you were at the University or subsequent thereto?

A. Yes. Of course, we studied chemistry, studied physics, studied about cases.

The Court: There has been testimony in this case—let's simplify it—there has been testimony in this case that this man worked in this plant where he was subjected to the dust of soda ash. Now, why do you think there is any connection between that and his abscess?

Mr. Turtur: Also phosphate of soda.

Mr. Rudner: Your Honor please——

The Court: Please don't make it more difficult, Mr. Rudner.

Mr. Rudner: This witness will have — qualify with reference to these dusts, cause and effect. [fol. 267]

The Court: Maybe we can tell from his answer whether he knows anything about it.

Mr. Rudner: Well, if he testifies we get the answer without his qualifying.

The Court: Have you ever had a dust case?

The Witness: No, I never had.

The Court: He is not qualified.

Mr. Turtur: Very well, I withdraw Dr. Steele at the present time.

The Court: For what fact do you want him?

Mr. Turtur: To show he was the treating physician and what he found, that's all.

The Court: Ask him the man's present condition.

Q. Have you examined George Matey again?

A. No, I didn't examine him lately, I just looked at him today, I didn't give him any examination as far as I——

Q. What was your observation of the man today?

A. He is in very bad shape, he cannot get up; he is in bed all the time; he is expectorating all the time; he cannot say a word without coughing and when he coughs the sputum comes up. That sputum has a very bad smell and [fol. 268] there is quite a large volume.

The Court: Which we already knew. Cross-examine.

Cross-examination.

By Mr. Rudner:

Q. When did you treat this man, 1934?
A. 1934.
Q. For how long?
A. About two weeks.
Q. You didn't treat him after that?
A. No, after he went to the hospital I didn't see him after.
Q. Since those two weeks in the summer of 1934—was it in the summer of 1934?
A. I think it was in the summer.
Q. You haven't treated him since outside of seeing him this morning?
A. That's right.
Q. That's all.

[fol. 269] **Alexander O. Gettler**, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Doctor, what is your profession or occupation, please?
A. I am Professor of Chemistry at New York University; Professor of Toxicology at Bellevue Medical College and Toxicologist for Chief Medical Examiner's office New York City for over twenty years. I have taught physiological and pathological chemistry, Medical chemistry to medical students at Bellevue Medical College. I am consultant toxicologist to several hospitals.
Q. What are the hospitals, please?
A. French Hospital, Bushwick Hospital, Lenox Hospital.
Q. And have you ever written any books, doctor, on the subject of Toxicology and Chemistry?

A. I have.

Q. Many?

A. Yes, I have written about forty or fifty publications.

Q. And are those publications widely in use?

A. They are.

[fol. 270] Q. Now, Professor, did you at my request make a chemical analysis of the following exhibits—the exhibits now being shown to the professor are the ones that were offered in evidence the other day of samples taken by Matey at the plant, Exhibits P-1 taken at the depositions to P-7 inclusive. Did you, doctor, at my request, make a chemical analysis of those samples before you?

A. I did.

Q. And what are the respective samples, doctor?

A. There is a white powder wrapped up in a paper marked silicate powder P-1; this powder is sodium silicate.

Q. And what is that sodium silicate, doctor?

A. Well, that is a ch[illegible]al, inorganic chemical compound made up of sodium [illegible]con and oxygen.

Q. And what are some of the other samples, doctor?

A. This sample here which is labelled "phosphate of soda" and labelled P-5, that is sodium phosphate, trisodium phosphate.

Q. And what are some of the others please?

A. This one marked metasilicate, that is also sodium silicate, P-7 and P-6 marked Soda ash is sodium carbonate and this is silicate rock. These liquids I didn't do much with.

[fol. 271] Mr. Rudner: Silicate rock is Exhibit——

The Court: No one contends he breathed in liquids, do they?

Mr. Turtur: No, your honor; those are all the samples.

Q. Now, doctor, what are those samples with reference to irritating effects upon the human system?

Mr. Rudner: Your honor please, I object to that unless the doctor is qualified.

The Court: Well, are your doctors going to say they don't irritate the human system?

Mr. Rudner: Pardon me?

The Court: Are your doctors going to contend that they don't irritate the human system?

Mr. Rudner: I think a doctor should first qualify with respect to his experience.

The Court: Dr. Gettler is one of the best known toxicologists in the world; everyone knows that.

Mr. Rudner: That may be so with respect to various phases of Dr. Gettler's experience.

The Court: You may cross-examine as to his experience.

[fol. 272] Cross-examination (as to knowledge).

By Mr. Rudner:

Q. Doctor, what has been your experience or have you had any experience in connection with industrial dusts?

A. Yes, sir.

Q. You have?

A. Dusts in general?

Q. Yes.

A. Yes.

Q. What has been your experience?

A. Well, all kinds of chemicals.

Q. Have you actually worked in factories?

A. No, I have never worked in factories.

Q. I mean have you made any tests with dusts in factories?

A. No, I have never made any tests on dusts in factories.

Q. Have you ever made any tests on dusts in factories?

A. Not from factories.

Q. Pardon me?

A. Not from factories but the dust in factories is the same as chemicals outside of factories.

Q. I am asking you this, doctor: have you ever made any [fol. 273] tests or have you had any experience in making tests in connection with dusts in factories?

A. No, I have never taken any dust from a factory.

Q. What has been your experience in connection with dusts?

A. Well, dusts are chemicals; dust may be anything and I have experience, and I have analyzed practically all substances, all chemical substances.

Q. You have analyzed the actual substance, you have analyzed this particular powder, for example, as contained in these bottles, but have you had any experience, have you ever made any tests in connection with the inhalation of dusts in factories?

A. Well, now, you mean the physiological effects?

Q. Yes.

A. The physiological effect of chemical substances, the local effect is the same on all tissue.

Q. Now, doctor, if you don't mind, would you please answer my question. It was this: have you had any experience, have you ever made any tests in connection with the inhalation of dusts in factories.

A. I said I have not.

Q. Have you had any experience or have you made any tests in connection with the inhalation of soda ash dust or [fol. 274] phosphate dust in factories?

A. Not in factories.

The Court: That isn't the point; the point is, Mr. Rudner, whether he knows the effect of those substances on tissue, wherever they were picked up, whether they were picked up in factories or whether they were picked up in the street or wherever they were picked up.

Mr. Rudner: Your honor please, here is what I am driving at. I have read an awful lot of books in connection with this particular question. I am asking, not to be captious or to try to waste time—I say this, sir, the effect of any of these chemicals in swallowing them or getting them into the stomach is entirely different from the inhalation of things; you have a different situation and operation.

The Court: I understand. You can ask him if you like if he has had any experience in the effect of these chemicals on the tissues of the lungs.

Q. May I ask you, have you had any experience, doctor, made any tests with respect to the inhalation of dust from these chemicals?

A. By direct inhalation?

[fol. 275] Q. Yes.

A. No; I have applied chemicals to different tissues.

Q. Yes, the direct application to the tissue; my question—

The Court: What is the lung tissue, Dr. Gettler?

The Witness: You mean chemically?

The Court: No, both chemically and for a layman.

The Witness: Well, the lung tissue is composed of proteins, carbo-hydrates and fats, lipoids in general, with, of course, a lot of extractives, water, but the main bulk of the lung tissue is protein.

The Court: All right; now have you had any experience with the effect of these chemicals on proteins?

The Witness: Yes, sir.

The Court: What experience?

The Witness: Noticing the effect when caustic substances touch or come in contact with tissues.

The Court: What occasion have you had to notice that effect?

[fol. 276] The Witness: Well, we have had quite a number of cases—the cases we get mostly is the direct application of caustic substances to the mouth, mucous membrane of the mouth, to the oesophagus, to the stomach, to the intestines.

The Court: Well, are there proteins in the mouth?

The Witness: Yes. The stomach wall is protein in character, the liver is protein in character, all the organs are protein in character mainly.

Mr. Rudner: Your Honor's questions, of course, have been directed to the direct application of these chemicals to these particular tissues. Now, we have got to go further than that; we have got to develop the doctor's knowledge and experience with respect to the inhalation of that thing, and the doctor very specifically says and very frankly he has had no experience in that; that is an entirely different field, sir. Now, that is why I am trying to get—we all know this, that if there is a direct application, if a child will swallow lye and get it in its stomach, naturally these [fol. 277] things happen, but I will go further than that; we say, have you had any experience in connection with the inhalation of dust and a lot of things follow from that; that is an entirely different field.

The Court: I ask you, again, Mr. Rudner, are your doctors going to say that the application of caustic by way of inhalation cannot produce an abscess?

Mr. Rudner: Yes, sir. It cannot be done. I will say this to your honor further; we had several witnesses here yesterday, one man who worked in the silicate department from 1922 to 1929——

Mr. Turtur: I object to that, your honor please.

Mr. Rudner: That man is here, a healthy man.

Mr. Turtur: Just a minute; I object, your honor please; the question now to be propounded to the doctor is whether or not he is qualified.

Mr. Rudner: That's right. His honor has asked me a question.

The Court: I must say I think it would have been better if you had produced a doctor who had more experience of the effect of dust by inhalation.

[fol. 278] Mr. Turtur: Your honor please, Professor Gettler is a man who can tell the causal effects——

The Court: I have said that he is one of the greatest recognized experts, but that does not mean he has had any experience—there are doctors who specialize in inhalation.

Mr. Turtur: I suppose, your honor please, Mr. Rudner's questions go to the question of whether or not these doctors actually go to the factory and breathe in these things. Professor——

The Court: Of course he doesn't mean that.

Mr. Turtur: Professor Gettler is a man who has made thousands of tests in the field of toxicology as to cause and effect.

The Court: Have you ever treated, Dr. Gettler, a patient or examined a patient who was suffering from injury to the lung due to inhalation?

Mr. Rudner: Dr. Gettler is not a physician.

The Witness: I did not.

The Court: I didn't mean treated; I take out the word "treated"—examined, have you ever examined such a patient?

The Witness: I have not examined a patient that has [fol. 279] inhaled caustic powder.

The Court: You see you weaken his testimony.

Mr. Turtur: Pardon me, your honor please.

The Court: Well you do weaken it; don't argue with me, please; there must be doctors who can, who have observed or treated——

Mr. Turtur: Dr. Gettler, your honor please, is being produced by me as a professor in chemistry and as a professor in toxicology, and who has made countless numbers of tests with these caustics and these chemicals upon human bodies, and he can tell, your honor please, what the effect of the inhalation of these chemicals is to the human body.

The Court: That is exactly what he can't tell us.

Mr. Turtur: Well, that's——

The Court: Just a minute; he can tell us, and I don't suppose it would really be disputed, that the attacking of caustic soda on protein tissues of the body might cause an abscess.

Mr. Turtur: He will go beyond that, your honor please, [fol. 280] not only might but it would.

The Court: What then?

Mr. Turtur: And he will go also beyond that, your honor please, and tell what are the resulting effects as to symptoms &c. after the inhalation.

The Court: Dr. Gettler himself has told me he is not a physician.

Mr. Turtur: No, but Dr. Gettler has told your honor at the last time here that he is being called countless numbers of times in a consulting capacity to examine and to look at certain people who have these rashes and who have these skin eruptions that are due to certain chemicals and he prescribes or suggests to the various physicians what shall be given to that particular patient.

The Court: All right, but I say you would have done much better——

Mr. Rudner: Your honor, I go further—standard books on toxicology and on this particular subject do not present a single example or incident of inhalation of this type of dust causing a lung injury.

Mr. Turtur: That may be so, but Professor Gettler, he is the outstanding man in that field.

[fol. 281] Mr. Rudner: I admit Dr. Gettler is an unusually fine toxicologist, but in a very limited field.

The Court: He has never seen, he told us, a case of inhalation of this caustic.

Mr. Turtur: But your honor please, he is not being produced as a physician in this case; he is being produced as a gentleman who will give the chemical substances before him, what they are, what effect they have on the human system. I can qualify him for the next half hour and tell what some of his other experiences were.

The Court: But they are none of them in the field which we are discussing and you could have produced, I assume, doctors who were in that field.

Mr. Turtur: But, your honor please, I have produced Dr. Gettler so as to give to the court and jury the information necessarily required as to what these chemical substances are.

The Court: You already have that.

Mr. Turtur: All right; but he hasn't given us what the chemical substances are because I was interrupted by Mr. Rudner in so far as asking him as to any qualifications.

[fol. 282] The Court: Continue then with the chemical substances.

Mr. Rudner: I haven't finished my examination as to qualifications, but if Dr. Gettler states he has no experience and has made no tests with respect to inhalation, I respectfully urge that Dr. Gettler is not qualified to speak in this particular capacity and I will say further, the United States, your honor, has a most unusually excellent department of Public Health where this particular field is covered by experts.

Mr. Turtur: Your Honor, this is going beyond the issue. The question is, is Dr. Gettler qualified for the purpose for which he is being produced.

Mr. Rudner: Not in this case apparently.

The Court: I doubt it.

Mr. Turtur: He is being produced, your honor please, for what are these chemicals.

The Court: He is qualified for that.

Mr. Turtur: All right; then after "what are these chemicals," what effect do they have on the human system when they are inhaled over a certain period of time.

[fol. 283] The Court: I doubt very much if he can qualify to that.

Direct examination resumed.

By Mr. Turtur:

Q. Can you qualify to that?

A. Yes, I can answer.

The Court: He cannot qualify by saying "I am qualified."

Q. What experience have you had, doctor, to tell the court and jury here as to what those chemical substances are and what effect they would have upon the human system?

Mr. Rudner: I object to it unless—When they are inhaled over a long period of time?

The Court: Dr. Gettler has told us he has never examined a case of inhalation in his life.

Mr. Turtur: But he says, your honor please, that he has had that experience as to what injurious effect——

The Court: Did you, doctor, say that?

The Witness: I have studied the effects of caustics of all sorts upon all the various tissues of the human body.

The Court: Well——

Q. What is toxicology, doctor?

[fol. 284] A. Toxicology is the science which deals with the effect of all kinds of chemical substances upon the human body, upon the organs of the human body, their effects, their symptoms produced thereby, antidotes therefor, the qualitative detection of the foreign substance in the human body and the quantitative determination of the same.

Q. And in that particular field, Professor, how many tests would you say you had made through chemical analyses of the various organs of the body since you have been connected with the medical examiner's department of the City of New York as such toxicologist?

A. I cannot count them; hundreds of thousands.

Q. Hundreds of thousands; and in those hundreds of thousands of cases, doctor——

A. Not cases, tests.

Q. Tests, pardon me. In those hundreds of thousands of tests have any of those tests ever been made involving this kind of chemicals to the human system?

A. Yes.

Mr. Rudner: Now, your honor please——

The Court: He has answered yes, in hundreds of thousands of tests.

[fol. 285] Mr. Rudner: Do you mind if I object, your honor please? I object to that question. The doctor answered very quickly,—because that presents an entirely different situation than we are dealing with in this case. The doctor is testifying to situations of the direct application where he has actually seen a situation of drinking or direct application of these things to the tissue.

The Court: What quantity of particles of these caustic substances have to be applied to human tissue, to human proteins, to affect them, doctor?

The Witness: One little tiny dust particle,—I wouldn't say dust particle, one little tiny soda ash particle lying upon human tissue will — that one little locality, in that pin point, produce its characteristic irritation and corrosion; of course one little tiny particle will do no harm, but if a dust is spread over tissue so that hundreds and hundreds and perhaps thousands of little tiny particles fall thereon, you get hundreds of these foci and of course when these foci are in large number then you get the effect.

The Court: What do you call a large number doctor?

[fol. 286] The Witness: Well, a dust in general, if you spray a dust on tissue or if you inhale dust you get hundreds and hundreds of these dust particles getting in and you get hundreds and hundreds of these foci produced.

The Court: How do you account for the fact that in this particular plant, so far as we know, a great many employees during the years have not be- affected?

Mr. Turtur: I object to that, your honor please because that is not so from my information.

The Court: So far as we know, I said. How is that explained?

The Witness: I cannot explain it; the explanation I would give is either they have not inhaled much dust or they had a stronger constitution than a man that was affected under the same circumstances.

The Court: Well, the doctor's testimony is that if a sufficient quantity of dust particles containing caustic soda are inhaled, that they produce irritation which results in an abscess, is that correct, doctor?

[fol. 287] The Witness: Yes.

Mr. Rudner: Now, I move that all that testimony of Dr. Gettler be stricken out on the ground that he is not qualified as an expert with respect to inhalation of gases.

The Court: He said in sufficient quantity.

Mr. Rudner: Yes, sir, but Dr. Gettler is making that statement without having qualified himself; he has not had a single instance.

The Court: It doesn't make any difference whether you inhale something or whether you take a watering can and spray it on yourself; the method of application is immaterial.

Mr. Rudner: Why, if your honor please, Dr. Gettler's statement as to one particle having its effect is destroyed and falls of its own weight when we see those witnesses who came here yesterday and had the same experience as they say over a period of years, and there isn't a book that Dr. Gettler can show me that presents that situation of the lungs on inhalation; that is what we are dealing with.

[fol. 288] Mr. Turtur: That is a matter for cross examination, your honor please.

Mr. Rudner: No, I will go further; I will produce a man from the factory where they make this and they never had such a thing; I am going to produce him.

The Court: Where they make what?

Mr. Rudner: Where they manufacture soda ash and they never had a lung injury.

Mr. Turtur: Your honor please, as long as we are getting into generalities, I am not in a case and have been for the past year where they have accused——

The Court: I am not going to listen to that.

Mr. Turtur: I know, but Mr. Rudner is going into generalities and I prove definitely that a certain chemical belongs to a certain group——

The Court: You mean you think you have proved it. Now, we must conduct this case in orderly fashion and the difficulty is you are not giving your man a proper break because you are not getting the right doctors.

Mr. Turtur: I have the right doctor, your honor please.

[fol. 289] The Court: You could perfectly well get a doctor who specializes in this field of dust inhalation.

Mr. Turtur: Why, this gentleman, your honor please, says he has made hundreds and thousands of tests.

Mr. Rudner: Dust tests?

Mr. Turtur: Dust tests, where he has seen what the devastating effect has been upon the human tissues with dusts of these kinds, he says hundreds of thousands of tests; can we qualify a man more than that, your honor please?

Mr. Rudner: May I ask the——

The Court: I am not going to argue with you, Mr. Turtur.

Mr. Turtur: Well, I have been interrupted.

Mr. Rudner: I have a motion to strike all the doctor's testimony.

The Court: Motion denied; you may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 290] Q. Now, doctor——

Mr. Rudner: May I have an exception noted?

The Court: Yes.

Q. Those chemical dusts, the soda ash and the phosphate of soda and the silicate powder, what effect would they have upon a man inhaling them and being subjected to them in large quantity over a period of years?

Mr. Rudner: I object to it on the ground the doctor has not qualified with respect to any dust inhalation.

The Court: You may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. Soda ash, trisodium phosphate and sodium silicate react qualitatively the same so I can talk about one. Soda ash when coming in contact with water crystallizes and produces caustic soda. Caustic soda is a very strong corrosive substance. When it comes in contact with any tissue of the body it produces three main effects. The first effect is that it decomposes the protein of the tissue, that is it actually decomposes the tissue. The second effect is that it decom-[fol. 291] poses the fats and lipoids of the tissue by saponification; and the third effect is that it draws water out of the tissues which we call dehydration. Now, due to those three effects upon human tissue we get a series of symptoms.

Q. And what are they, doctor?

A. The main symptoms are irritation, corrosion, swelling, edema.

Q. What is edema?

A. That is an oozing out of serum; this is in general on all tissues; in the lungs, in the lung tissue you get a scarring effect; the system continually tries to cure the situation and you get a scarring effect which then produces emphysema which is simply that there is less breath space in the lungs.

Q. Does it have any effect upon the weight or sleep or fatigue?

Mr. Rudner: I object on two grounds; one that the doctor is not a physician; he is a chemist; second that he has not qualified.

The Court: Sustained.

Q. Doctor, all of these things that you testified to, have you had any experience whereby you were called upon to examine certain cases of skin eruptions due to chemicals?

[fol. 292] A. Yes.

Q. How many of those cases would you say?

A. Not many.

Q. And those that you have examined or those that you have seen and been called in for consultation, did you prescribe what to do for these people or rather did you recommend to the physicians as to what to do for these people?

Mr. Rudner: Objected to on the ground the doctor has not qualified; secondly he is not a physician.

Q. Have you ever been consulted by physicians on antidotes, doctor?

A. Oh, yes, that is toxicology; that is the science, the effects of materials on the human body; the symptoms, that is the toxicology.

Q. So that that is within the sphere of your profession?

A. Yes, symptoms due to foreign substances, drugs and chemicals is toxicology.

Q. Now, doctor, what other symptoms does an irritation or the inhalation of these dusts cause, further than what you have stated?

Mr. Rud*d*er: Objected to on the ground that the doctor has not qualified, is not a physician, has not qualified on [fol. 293] any inhalation cases.

The Court: Overruled; I have already ruled on it.

Q. Will you answer it, doctor?

Mr. Rudner: Do you wish me to state my objection?

The Court: No, I overruled it; I am not going to change my ruling within five minutes.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. Inhalation of irritating caustic substances produce violent coughing, expectoration; that expectoration may be very severe, it produces cyanosis.

Q. What is cyanosis?

A. Well, you get a blue-ish discoloration, due to lack of oxidation, due to some changes in the lung tissues; if it gets on the skin you get skin irritation; you get as I said before emphysema and due to that it is hard to get your breath; they are very difficult in their breathing and restless and don't sleep well and in some cases if the lung is [fol. 294] affected much they get anemia and weakness, general debility and of course due to their run down condition, they may get any infection.

Mr. Rudner: Your honor please, I move that all of Dr. Gettler's testimony be stricken out on the ground he has not qualified; he has gone beyond the scope of a chemist or chemical toxicologist and gone into the specific field of medicine, where he admits he has no experience and training.

Mr. Turtur: He says, your honor please——

The Court: I think you are very unwise to imperil your record, counsel. I am not going to say it again.

Mr. Turtur: He says that this is his profession, the field of toxicology.

The Court: I sustain the objection.

Mr. Rudner: My motion is to strike.

Mr. Turtur: All reference to the man's medical symptoms? Exception.

Mr. Rudner: I move that all the testimony be stricken out with respect to medical symptoms.

The Court: Motion granted.

Mr. Turtur: I ask an exception.

[fol. 295] Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed).

Q. Now, doctor, assuming that a person has been subjected to these substances over a period of years and has had skin irritations and so much so that fluids oozed from underneath his arms, and has also developed a cough, and also cold sweats, night sweats and fevers and also a sweet-sour taste in the mouth and a loss of weight and cough, general debility, lack of appetite, unable to sleep, pain in the chest along the region of his right lung, shortness of breath, loss of strength, increased respiration, chills and fevers, what is your opinion, doctor, that the condition that he is suffering from to-day, if he is suffering from a lung abscess, is due to?

Mr. Rudner: Objected to on the ground, your honor please, there is no proof of any lung abscess; secondly on the ground that the doctor has not qualified with respect to the medical questions which are part of that question.

The Court: Sustained.

Q. Are these substances, doctor, irritating to the human lungs?

[fol. 296] A. They are.

Mr. Rudner: I object to it; please, doctor, if I object do you mind holding off until my objection is presented; you have had court experience before; you understand.

The Court: Overruled.

Mr. Rudner: My objection——

The Court: I suppose it is the same. Overruled. You may have an exception.

Defendant's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Your answer is that they are?

A. They are irritating.

Q. If this man has been exposed to these irritants for many years, what will be the ultimate producing effect, doctor?

Mr. Rudner: Objected to on the ground, your honor please, that Dr. Gettler is not qualified from the medical or other point of view, has not qualified in connection with dust inhalation.

The Court: Sustained.

[fol. 297] Q. Well, have you seen the effect of the inhalation of these fumes, doctor, or rather the inhalation of these chemicals over a long period of time?

The Court: He has already testified that he has had no experience with inhalation at all.

Q. What were those tests, doctor, that you made that went into the hundreds of thousands that you spoke of before?

A. By that I mean all the tests I have done in my career; I have done many tests on the effects of caustic substances on various human tissues by applying different concentrations in solid form and liquid form to different organs and noticing the effect. I have also in living individuals studied the effect of soda ash when taken internally coming in contact with the mucous membrane of the tube, the stomach and the intestines.

Q. What do those tests and those experiences reveal when they come in contact with those substances?

Mr. Rudner: Objected to on the ground the doctor is not qualified in connection with inhalation cases.

[fol. 298] Mr. Turtur: Your honor, he has just got through saying he did the very thing for which he has been produced, to living persons who have inhaled and been subjected to this soda ash.

The Court: You may answer.

Defendant's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. The effect is irritation, corrosion, erosion which means ulceration, the whole series that I have given before, corrosion of all degrees and states.

Q. Are these chemicals, doctor, solvent or insolvent in water?

Mr. Rudner: Soluble, you mean?

Q. Or rather, I beg your pardon, soluble or insoluble?

A. They are soluble.

Q. And what effect does it have when it comes into contact with human tissues?

Mr. Rudner: Objected to on the ground the doctor is not qualified with relation to inhalation cases.

The Court: I won't rule on every single question; you may [fol. 299] have an exception to my permitting him to testify as to the effect of this caustic soda on the tissues of the human body.

Mr. Rudner: All right, sir: I thought I was required to do that.

(Question repeated by the reporter.)

A. Irritation, corrosion, ulceration.

Q. And what effect does it have, doctor—withdrawn. Is the lung a dry tissue or a wet tissue, doctor?

A. A wet tissue.

Q. And if the soda ash and phosphate of soda comes into contact with the lung which is a wet tissue what is its effect?

A. The material dissolves, hydrolizes and produces caustic soda.

Q. Produces what, please?

A. Caustic soda, sodium hydroxide.

Q. And what effect does that have upon the lung?

A. The same effect that I just said, corrosion, irritation, ulceration.

Q. And what are some of the symptoms that are derived as a result of that corrosion and irritation &c?

[fol. 300] A. Coughing, expectoration, cyanosis, difficult breathing.

Mr. Rudner: Now, your honor please, I move that be stricken, because the doctor is getting in the field of medicine.

The Court: Sustained.

Mr. Rudner: I move that be stricken.

Mr. Turtur: That is toxicology, your honor please; he teaches the very particular thing for which he is produced.

The Court: You may have an exception.

Plaintiff's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Answer it, please, doctor.

The Court: No, you may have an exception.

Mr. Turtur: Oh, I beg your pardon.

Q. Does the soda ash, doctor, have the same effect on the human tissue as phosphate of soda?

A. Same effect only a little stronger.

Q. And does the silicate, the breathing in of metasilicate, phosphate of soda and soda ash produce all of those things that you stated before?

A. Yes.

[fol. 301] Q. What is the ultimate effect, doctor, of the scarring of the lung tissue?

Mr. Rudner: Object to it on the ground that now we are in the field of medicine and the doctor does not qualify.

The Court: Sustained.

Mr. Turtur: Take the witness.

Cross-examination.

By Mr. Rudner:

Q. Doctor, you are not a physician?

A. No, sir.

Q. And your studies have been limited to chemistry and toxicology from a chemical point of view?

A. No, sir.

Q. What has your training and experience been with respect to toxicology?

A. My experience in toxicology, as I said in my qualification is not only chemical detection and quantitative estimation of poisonous substances in the human body but also the effect of these substances on the human body, the symptoms which they produce which I have taught to medical students for twenty years, the antidotes for them; in fact everything about poisons.

Q. When did you receive these chemicals that constitute [fol. 302] these various exhibits, doctor, what date?

A. I haven't got my notes here; I am sorry; I didn't bring my notes along.

Mr. Rudner: Do you know, Mr. Turtur?

Mr. Turtur: Yes, some time after October 4th of 1935 after they came into my possession, I went over to Dr. Getler and asked him to please make a chemical analysis of those and their effects on the human tissues.

Mr. Rudner: About what date was that, do you know?

Mr. Turtur: Some time about October 4, 1935.

Q. What date did you give your report?

A. These remained in my laboratory for a few months.

Q. For a few months?

A. Yes; I was very busy and I couldn't get to testing them and after a few months—now, of course I don't remember whether it was two or three, then I analyzed them and I gave the report.

Q. You had them about two or three months before you gave the report?

A. In fact I didn't analyze them for two or three months.

Q. You waited two or three months before you analyzed [fol. 303] them, then you gave your report and after you gave your report did they still remain in your possession, or did you give them back to Mr. Turtur?

A. They stayed in my possession until Mr. Turtur sent for them.

Q. Which of those powders did you actually analyze, all of them?

A. These.

Q. How about——

A. This one I just tested as to alkalinity.

Q. And you made tests, analyzed these four powders that is Exhibit- P-6, 7, 5 and 1 (numbers marked at taking of depositions)?

A. Yes.

Q. You didn't examine this liquid?

A. No, because the liquids, you cannot get liquids in dust, you can only get them in spray.

Q. And exhibit P-3 you didn't touch?

A. No.

Mr. Turtur: Will this help you in your report, doctor, as to the date for your notes?

The Witness: May 6, 1936 is the date of the report.

Mr. Rudner: Pardon me?

[fol. 304] The Witness: May 6, 1936 is the date of the report.

Q. So they were delivered to you last October and you gave the report May 6, of this year?

A. Yes, sir.

Q. Have you made any study or examination in connection with industrial cases involving the inhalation of dust?

A. No.

Q. None whatever?

A. No, I have done no——

Q. Pardon me?

A. I have had no case where material was inhaled.

Q. Material was what?

A. I have had no case directly where material was inhaled.

Q. And have you made any examination of the books with respect to the inhalation of these dusts?

A. Oh, I have read.

Q. Pardon me?

A. I have read practically all the books there are on toxicology.

Q. But you have made no study of those books?

A. Oh, yes.

[fol. 305] Q. No studies of those books involving the inhalation of dust?

A. Reading them.

Q. Pardon me?

A. Yes, I have studied them; I have read them.

Q. Involving inhalation of soda ash and the other substances?

A. There is very little written on the subject.

Q. Yes; and in the course of your reading you have found no case involving the inhalation of soda ash which would bring about an abscess in the lung?

A. I haven't read it in the literature.

Q. Whatever literature you have read, whether in text books or journal or writings, you have not found a single case where the inhalation of soda ash or phosphate dust brought about a lung abscess, is that correct?

A. I haven't seen a case in the literature.

Q. Yes; am I correct in my statement?

A. Exactly that, yes, but the literature states throughout——

Q. Pardon me?

A. —the caustic effect of these substances on tissues.

[fol. 306] Q. Well, my question was this, doctor—repeat it.

Mr. Turtur: I object to that, your honor please; that answers the question as propounded by Mr. Rudner.

The Court: Object to what, the stenographer reading the question?

Mr. Turtur: No, no, I object——

The Court: Wait till it is read.

(Question and answer repeated by reporter.)

Q. All you say is this, doctor, that if the tissue is presented, and the tissue is moist and this caustic soda comes in contact with the moist tissue these results happen?

A. That's right.

Q. You said that a particle of dust will bring about this result; have you ever made any tests as to the sizes of particles of dust?

A. No.

Q. Do you know what microns are in connection with dust particles?

A. Very small·tiny particles.

Q. Pardon me?

A. Very small tiny particles.

Q. Do you know of how many microns a particle is of dust?

[fol. 307] A. How many what?

Q. Of how many microns a particle of dust consists?

A. Well, a micron is a particle that can be seen by——

Q. What is a micron; just tell me what a micron is.

A. A micron, from colloidal chemistry——

Q. As to size.

A. —is a particle that is visible to the microscope.

Q. Give it to me in actual size, a micron of dust.

A. I don't——

Q. Suppose I help you. A micron is a thousandth part of one millimeter or the millionth of a meter. Did you ever hear that before?

A. Oh, yes, I have heard that before. I was thinking of the micron, sub-microns——

Q. I am talking about microns with respect to particles of dust.

A. They are very small; I will agree with you.

Q. What size of particle of dust in terms of microns have had these effects of which you speak on tissue under the circumstances of your experience in inhalation?

[fol. 308] A. We don't measure the size to the one-thousandth of a millimeter.

Q. As a matter of fact they are measured, aren't they, dust particles?

A. Yes, they are.

Mr. Turtur: May he answer without interruption? Every time he tries to answer there is another question. May he answer, please, without being interrupted?

Q. Have you ever measured——

A. When we study the effect of small particles of material such as powders, we don't measure them down to the one-thousandth of a millimeter; we just take the small dust particles and see the effect of them on tissues.

Q. Let me ask you this, doctor; when you spoke of the effects of that type of powder on human tissue, did you have reference to the actual powder or the dust from the powder?

Mr. Turtur: Now, what does that mean, your honor please?

Mr. Rudner: Oh, there is a big difference. The doctor doesn't need any help.

[fol. 309] A. There is no difference. The only difference is that the small particles are here together and when you spray them into the air, these same sized particles are distributed through the air.

Q. Now, I ask you, when you examined and made the tests with respect to human tissue under the circumstances to which you did testify, was it in connection with the actual powder being applied to the tissue or dust from powder?

A. Same thing.

Q. Oh, it is the same thing. What were the size of these particles of dust?

A. As I said before, we don't——

Q. You never measured them?

A. I don't measure them; I only know it is a fine powder.

Q. All right; isn't it a fact that powders, dust particles are of varying sizes?

A. Yes.

Q. And having regard to the sizes, they have different effects?

A. The effect is different in degree.

Q. Yes; different in degree?

A. A small particle——

[fol. 310] Mr. Turtur: Let him finish, Mr. Rudner.

A. A very small tiny particle will have a certain effect; a large particle will have a greater effect.

Q. Now, you say that those powders, as they stand there, are entirely harmless; is that correct? Only when they come in contact with moisture do they have the effects of which you speak?

A. The greatest effect is due to the change which occurs when they come in contact with moisture.

Q. After they are hydrolized?

A. Yes.

Q. When they come in contact with moisture?

A. Yes.

Q. Now, eliminating the moisture, taking those powders as they there stand, they are entirely harmless?

A. Oh, no.

Q. What's that?

A. No, no; there are many powders——

Q. I am not talking about many powders, I am talking about those powders.

Mr. Turtur: Just a minute; he wants to give the answer and is interrupted again; can he give the answer?

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[fol. 311] Mr. Rudner: The doctor is going too far afield.

Mr. Turtur: No, I beg your pardon; he is going to answer your questions if you will let him.

Q. I am asking in connection with those particular powders.

A. There are at least two effects due to any powder; the first effect is the solid form, if it doesn't dissolve, the solid form is a foreign body, such as for instance in silicosis.

Q. We are not dealing with silicosis; I am asking those things in their particular form.

A. I am trying to give you——

Mr. Turtur: He is giving the effects.

A. I am trying to give you an example, that's all; that is the first effect, simply as a foreign body. Now, when the substance, besides that, is acidic or basic, caustic, that is a second effect. Now, with these substances, the caustic effect is by far the greatest.

Q. That caustic effect does not arise until moisture comes into the field and there is a hydrolization?

A. That is what I said.

[fol. 312] Q. I am talking about before you get any hydrolization, before those powders change in any form whatever, in their present form in that bottle, they are absolutely harmless, are they not?

A. In that bottle?

Q. Yes.

A. In that bottle they are harmless.

Q. Take them out of the bottle, let's not be technical, before they reach any moisture are they harmless?

A. You mean in contact with the human body?

Q. Yes.

A. In contact with the body——.

Q. No, let's say dust coming out of that, and doesn't reach moisture.

A. Well, if you have the chemicals here, of course they are harmless.

Q. Suppose they are out of the bottle now and they have not reached moisture; what is the effect of those chemicals?

A. They remain the same if no moisture hits them, they remain the same.

Q. It is only when they come in contact with moisture?

Mr. Turtur: He says, Mr. Rudner, if no moisture hits [fol. 313] them, they remain the same.

Mr. Rudner: I heard what he said.

Mr. Turtur: And the lung is moist.

Mr. Rudner: Now, if your honor please if counsel will just not put in these side remarks we will get along first rate. I heard what the doctor said and I am going to follow it with a question.

Q. Now, there is moisture in the air too, is there not?

A. There is.

Q. And when a dust particle strikes the moisture in the air it falls to the ground, is that right?

A. It falls to the ground whether it hits the moisture or not.

Q. That is the fact that the weight of the water takes it to the ground?

A. Doesn't necessarily have to have water; dust in general, if you leave it stand for hours, gradually goes down and rests on the floor.

Q. Doctor, that soda ash which you had there, what is that made of, what are the chemical component parts?

A. It is made up of two atoms sodium and one of carbon and three atoms of oxygen.

[fol. 314] Q. Now, how about the—there is some sodium bicarbonate as part of the soda ash?

A. No, that is sodium carbonate.

Q. How about sodium bicarbonate?

A. This material is not sodium bicarbonate.

Q. How about sodium chloride?

A. It is not sodium chloride with the exception of a small trace of an impurity.

Q. May I ask this, doctor: this soda gets into the mouth; does it have the same effect that you speak about it getting into the lungs?

A. Yes, if it rests there.

Q. You mean if it gets in the mouth there is moisture there?

A. If it rests there for a long period, yes.

Q. Oh, if it rests there for a long period.

A. Yes. In the mouth the saliva is continually running, especially when you get a foreign substance into the mouth and that saliva washes the tongue continually and you are swallowing the saliva so it does not remain there very long.

Q. But there is moisture in the mouth?

A. Oh, yes.

Q. And you swallow that therefore?

A. Yes.

[fol. 315] Q. But if you do get it into the mouth, does it have the same effect of which you speak?

A. If it rests there for long periods which it does not.

Q. How long does it have to rest there?

A. Oh, hours, days, months.

Q. And how many particles must you get to cause that?

A. Cause what?

Q. How many particles of this dust, of this powder?

A. I answered that before.

Mr. Turtur: To cause what, the doctor wants to know.

Q. To cause whatever the doctor has been talking about which he says will happen to the tissue of the lung.

A. I said before that if one tiny particle rests on any tissue for a long period of time, it will form locally an irritation and corrosion in that one tiny spot. Now, of course one tiny spot will do no harm because all tissues——

Q. Oh, now,—finish your answer, excuse me.

A. (Continuing.) All tissues are large and if one or two tiny spots become corroded, the rest of the organ can take care of the work; but if many particles rest, you get [fol. 316] just that many foci of corrosion and irritation.

Q. So the irritation doesn't come with the mere spontaneous application of the dust particle to the tissue?

A. Oh, yes, the irritation comes right away.

Q. Why doesn't it come right away in the mouth?

A. It does, the irritation——

Q. I see; so the moment——

Mr. Turtur: Let him finish. Give him a chance——.

Mr. Rudner: I am giving him a chance; I don't have to be told.

A. (Continuing.) But to get a corrosion you have to have continual irritation for some time.

Q. So that putting some of this soda ash in your mouth, as you say, does cause a spontaneous irritation?

A. Yes.

Q. But the corrosion, you say, does not come until later?

A. Yes.

Q. How much later does it come?

A. That depends upon various factors, depends firstly upon the nature of the tissue and secondly depends upon the time, the amount of material and how long it stays [fol. 317] there.

Q. Let me ask you this; this soda coming in contact then with any moisture, wherever that moisture may be, brings about this hydrolization and its change to caustic soda?

A. Yes; if I take some of this material and dissolve it in a little water, that is soda ash, and put my fingers in there and keep my fingers there for three or four minutes,—everybody has tried this, this is nothing but washing soda only twice as strong, you take washing soda, put your fingers in and wash something, take your fingers out, you will see that they are all irritated and slimy-like and attacked.

Mr. Rudner: I am through, sir, except that I want to ask again, sir, to strike out Dr. Gettler's testimony on the ground that he has not qualified, both from the point of view of not being a physician; also from the point of view that he has no experience admittedly of inhalation of dust.

The Court: Denied.

Defendant's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 318] Redirect examination.

By Mr. Turtur:

Q. Doctor, what did you mean when you said that this was twice as strong as washing soda?

The Court: I suppose he meant just twice as strong as washing soda.

Mr. Turtur: I wanted to follow it by what effect it would have on human tissues if it was twice as strong as washing soda.

The Court: Then ask him that.

Q. Doctor, what effect would that have upon human tissues if this soda ash as you say and phosphate——

The Court: He has already testified to the effect it would have on human tissue.

Q. Would it have any more effect—is washing soda a harmless chemical?

A. No, washing soda is irritating and corroding.

Q. Now, you said something about corrosion, continual irritation for some time. Now, if he were, if George Matey, the plaintiff in this case, were subjected to the inhalation of dust, so much dust, doctor, that at times it was as heavy as smoke, and you couldn't see from one end of the room to the other, and if he was exposed to this for years, now in [fol. 319] your opinion would you say that that would have a more devastating effect from the standpoint of corrosion than if he were just subjected to it for only a moment or two or a day or two or a week or two?

Mr. Rudner: I object to the question, on the ground the witness has not qualified with respect to inhalation. Your honor has so ruled.

Mr. Turtur: Your honor did not rule out the subject of the effect upon the human tissues now, Mr. Rudner.

The Court: The answer is obviously "Of course it would be more so."

Q. Well, may we have it, doctor?

Mr. Rudner: Exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. Certainly, the longer in contact with the substance, the more the effect.

Q. Well, now, how long would you say, doctor, it would require to be exposed to the particular substance before this corrosive effect and irritation would have any effect [fol. 320] upon human tissue, under the circumstances that this man was working?

Mr. Rudner: Just a moment, is your honor allowing questions with respect to inhalation? This last question is based upon inhalation.

The Court: By whatever means it came in contact. I don't want to say it again, but your case won't be worth anything if you continue your present line.

Mr. Turtur: Well, I want to ask the doctor——

The Court: And I won't permit a case that is worth nothing to be appealed.

Mr. Turtur: But your honor please, your honor if you recall asked him the question the last time as to how long an approximate time it would take.

The Court: I sustain the objection. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: I move that the previous question and answer be stricken.

[fol. 321] Q. What are the sizes of the microns, Doctor, would you say, from the standpoint of the microns if this dust is as heavy as smoke, and subjected to——

Mr. Rudner: Objected to on the ground the Doctor is not qualified.
The Court: Sustained.
Q. That is all.

Arthur Raymond Casilli, called and sworn on behalf of the plaintiff:

Mr. Turtur: Your Honor please, it is stipulated, as I understand from counsel, that the X-rays here being produced are the X-rays of George Matey and that they all show a lung abscess; that is so, isn't it?
Mr. Rudner: No, sir; I told Mr. Turtur I would gladly co-operate to save him from the expense of calling the man who took them. I don't object to these going in evidence, but on the diagnosis I want the testimony.
[fol. 322] Mr. Turtur: Your honor please, it is stipulated that these are the X-ray plates taken of George Matey and there are six in number.

(Witness withdrawn.)

[fol. 323] Raphael Pomeranz, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Doctor, you are a practicing physician of the State of New Jersey?

A. I am.

Q. And have been so for how long?

A. Since 1924.

Q. And have you specialized, sir, in any branch of medicine?

A. I did, in X-ray diagnosis and treatment.

Q. And of what University are you a graduate?

A. I graduated in Vienna, Austria.

Q. And in Vienna what did you do, that is, from the standpoint of your profession?

A. Well, first I finished medicine, then specialized in X-ray work, then I was at City Hospital in Newark. I worked at the Bellevue Hospital in New York for a short time and then I opened my practice in 1924.

Q. And you have always been doing then X-ray work since getting out of college, is that so?

A. Yes.

Q. Now, I show you these X-rays, Doctor. I ask you, if you please, to examine every one of them and please give [fol. 324] your diagnosis. Have you a shadow box?

The Deputy Marshal: No.

Q. I show you one X-ray, 1497-A, taken the 6th of July, 1934, and ask you to give your diagnosis of that.

A. That is a chest plate taken back-front view, posterior-anterior view. I will need a shadow box for that. The lung field shows good illumination. The upper part of the right upper lobe shows also fair illumination; in the central part of the right lung field a cloudiness can be noted, which is not sharply defined, extends from the right hilum region towards the periphery of the chest wall and is quite dense.

Q. What does that mean?

A. Cloudiness means diminished aeration, no air at that point in the lungs, so that the projection of it on the plate produces a white shadow.

Q. And what does that white shadow indicate to you, sir?

A. Well, may I go and see all of them and then interpret it all at once?

Q. All right, look at all of them, Doctor.

The Court: I understood that it was conceded that the man had an abscess of the lung.

[fol. 325] Mr. Turtur: He would not concede that, that is why I took Dr. Casilli off.

Mr. Rudner: Our doctor has a different diagnosis.

The Court: Has he? Oh, I didn't know that. You mean that your doctor disputes the abscess?

Mr. Rudner: Your Honor, our doctors claim it is a bronchiectasis.

The Court: What is that?

Mr. Rudner: Condition of pus in the lobes of the bronchi. There may be more or less of a shade of difference.

The Court: I don't know it myself. Do you know it, Doctor?

The Witness: Yes.

The Court: What is the difference?

The Witness: Well, the difference is this: a lung abscess is a cavity in the lung tissue which is caused by destruction of the lung tissue. It is a cavity there, shows an inch or an inch and a half in size, it shows a fluid level because there accumulates secretion in there and it is localized in one spot originally. As the case gets chronic it may form several cavities in the neighborhood. Now, the bronchi [fol. 326] that lead to a cavity are usually changed in every case where there is a lung abscess. The leading bronchus is changed and if the leading bronchus is changed it forms dilations and this is called bronchiectasis because the wall of the bronchus is weakened.

The Court: What do these X-rays show or can you tell from them?

The Witness: I examined these X-rays before. My opinion was it was an abscess originally and there was a great deal of pleural pathology subsequently, that means pleural adhesions and shrinkage, and it involves so much of the right middle lobe that it extended out to the base of the right lung and involved the pleura of the right lung and probably there are bronchiectases with it.

Mr. Turtur: May I inform the court that the lung man that I have here will also develop the field of bronchiectasis and this abscess.

The Court: That is what you say the X-rays shows, is that it?

The Witness: Yes.

Q. What is your ultimate diagnosis according to those X-rays, Doctor?

[fol. 327] A. Well, that is what I said; it is a lung abscess primarily, a great deal of pleural pathology subsequently which extended to the right base and involved more of the right middle lobe than involved the right lower lobe, and there are probably some bronchiectases there which we cannot see this way.

Q. Now, Doctor, how large would you say is this abscess?

A. Well, originally——

Q. From the X-rays.

A. Well, the X-rays show not only the cavity but it shows the tissue around it and that tissue is also clouded while the cavity shows again an increased transparency. Now, we know from pathology that the abscesses are usually one or two inches in diameter. Originally that is what it was here in this case too. Original films that were taken in 1934 and 1935——

Q. And what was the last one?

A. As I remember, the last one involved already the entire lower right half of the lung.

Q. And how large in area would you say, as to inches in size, would that be?

A. Well, it depends on the size of the patient or the size of the lung.

Q. Well, can you give us that estimation from the——

[fol. 328] A. I don't think it has any importance.

Q. Well, did the size of the abscess increase, Doctor, from the first X-ray that was taken to the last?

A. Well, the increased cloudiness in the lung picture does not mean that the size of the abscess increased; it means the pleura and surrounding structures were infiltrated.

Q. What does that mean?

A. Well, diseased.

Q. That the disease has gotten progressively worse?

A. That it involved more of the right lung.

Q. And what effect does that have upon the human system?

A. Well, here it produced first a shrinkage of that part of the chest and secondarily produced a dyspnea, shortness of breath, loss of weight, mouth expectoration.

Q. Anything else?

A. Well——

Q. Coughing, you said?

A. Coughing. I said expectoration, shortness of breath.

Q. Loss of weight?

[fol. 329] A. Sweats.

Q. Anything else, Doctor?

A. That's all.

Q. And that kind of an abscess, is it sufficiently serious so as to cause a person to remain in bed?

A. Well; it depends on the case. In this case it is quite fairly well advanced, of course, at the present time; we have to know the rest of the clinical symptoms to establish that.

Q. Well, assuming then, Doctor, that this man was subjected to caustic substances, caustic chemicals such as soda ash and phosphate of soda and silicate dust which are caustic and irritating to the lungs and to the tissues, and he had been subjected to this condition, Doctor, for a period of years and at times so much so that the dust was so heavy that it was almost as heavy as smoke and that you couldn't see a person from one end of the room to the other; that in 1931 he developed a cough and started also to feel a general debility, loss of weight, loss of appetite, loss of sleep, headaches, night sweats, cold sweats, chills and fever, pain in the chest, and that he also developed a skin condition and that he occasionally would be home on and off as a result of this skin irritation so that in November of 1933 when he last worked for the company he became so disabled [fol. 330] that he could not work any longer, and that from then on in July of 1934 he was operated on for a hernia, and after the hernia he was in the hospital for approximately seventeen days and three days thereafter he developed this sputum with this pus and this foul odor, and that thereafter he was confined to the Memorial Hospital in New York and there a diagnosis was given of a lung abscess and then sent home again and remained in bed, then he again went to the Alexian Brothers Hospital some time in October of 1935 and remained in bed all that time down to the present time, always continuing with this cough and this sputum coming up of approximately a pint or more per day, and he is almost skin and bones down to the present time; does that help you to give your answer, Doctor?

Mr. Rudner: What is the question?

Mr. Turtur: The question is was that of such a serious nature, the lung abscess, so as to cause him to be in bed.

Mr. Rudner: Your Honor please, that is the most purposeless question. All these facts are stated and then he asks is it serious enough for him to be in bed. The man is sick, I am not disputing he is in bed properly.

The Court: Again and again we have conceded that the [fol. 331] man is desperately ill.

Mr. Turtur: All right, that's all. Cross-examine.

Cross-examination.

By Mr. Rudner:

Q. Doctor, I didn't get where you practice; Elizabeth, was it?

A. Newark, New Jersey.

Q. Your specialization is that of examining X-rays?

A. X-ray diagnosis.

Q. You didn't make any of these X-rays?

A. No.

Q. You don't specialize in lung and chest diseases, do you?

A. No, my specialty—there is a great deal of lung work but the X-ray——

Q. Examination of X-rays?.

A. Yes, interpretation of them, interpretation of chest films is a science by itself.

Q. You take X-rays, I suppose, yourself?

A. Yes.

Q. And you diagnose from X-rays?

A. Yes.

[fol. 332] Arthur Raymond Casilli, recalled.

Direct examination.

By Mr. Turtur:

Q. Doctor, you are a practicing physician of the State of New Jersey?

A. Yes.

Q. And have been so for how long?

A. 20 years.

Q. With what institutions are you connected, please?

A. I am the director of the Board of Health laboratory for the City of Elizabeth; Pathologist of the Elizabeth General Hospital; St. Elizabeth Hospital; Alexian Brothers Hospital; Perth Amboy General Hospital.

Q. And what field of medicine do you specialize in, Doctor?

A. I specialize in pathology.

Q. And what is the science of pathology with reference to medicine, Doctor?

A. Pathology has to do with the structural and functional changes, that is to say, the deviation from normal, due to disease affecting both the structure as well as the function of the body.

Q. Now, Doctor, from your experience as a pathologist would you be so kind as to explain the chain of events of [fol. 333] a person who is subjected to chemical irritants such as soda ash, phosphate of soda and silicate dust and is subjected to the inhalation of these fumes so that since 1931 he first noticed a carbuncle or a pimple in back of *the* his neck and was operated on for a carbuncle and then towards the latter part of 1931 he developed an irritating cough, then he had pain to the right side of his chest along the lung region in the back and he complained of cold sweats and night sweats, or had them rather, also feverish, started to lose weight, had a general debility, lack of appetite, unable to sleep, pain in the chest and loss of strength, increased respiration, shortage of breath, chills and fever—now, all of that has continued down to the present time, Doctor. Further than that, in the year 1934, about July, Doctor, he was operated on for an inguinal hernia which he says he got at the plant as a result of this cough. He was in the hospital for about seventeen days, and during the whole of the seventeen days there was no sputum of any kind that came up; after three days that he was home he felt the sputum come up which was pus-sy and ever since then he has been getting approximately a pint or more of this sputum per day. Now, will you please develop the [fol. 334] chain of events and the causation, Doctor, from a pathological point of view with reference to this case.

Mr. Rudner: Now, if your Honor please, I object to that question on the ground that Dr. Casilli is qualified only with respect to pathology, no relation to inhalation.

The Court: I don't know what you are driving at, Counsel.

Mr. Turtur: Well, your Honor, pathology, as I understand——

The Court: I understand what that is but I don't understand what you are driving at.

Mr. Turtur: I want him to explain what happens to the human system, your Honor please, after these fumes are inhaled and what takes place within the human system so as to bring the condition down to the present day.

The Court: What fumes?

Mr. Turtur: These chemical dusts, soda ash and silicate.

The Court: Has he any experience with them?

The Witness: I was just about to relieve the situation by saying I cannot answer that, I have no experience with soda dust.

Q. Well, assuming, Doctor, that soda phosphate or rather [fol. 335] soda ash——

A. I will not answer that question, I don't know anything about soda ash.

Q. Well, what happens, Doctor, outside of soda ash, assuming——

The Court: That's all we are concerned with. I will sustain the objection.

Mr. Turtur: Just a moment, your Honor. I would like to ask him this question:

Q. Assuming, Doctor, that he inhaled corrosive chemical substances and all of those things happened, regardless of the name of the substances, what would you say happens to the human body after the inhalation thereof?

Mr. Rudner: I object.

The Court: I sustain the objection. You may have an exception.

Mr. Turtur: Your Honor, this gentleman is a very important witness and I would appreciate——

The Court: It would seem to me that you would have done better if you would get a witness who had some familiarity with the particular substance which we are dealing with.

Mr. Turtur: Yes, but here is a gentleman who is a pathologist and he can explain——

[fol. 336] The Court: I will sustain the objection. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. What effect, Doctor, does a lung abscess have upon the lung and what takes place within the body in the lung tissue?

Mr. Rudner: Your Honor please, the Doctor is not asked the question in——

The Court: Doctor Pomeranz has quite fully exploited that.

Mr. Turtur: Yes, but this gentleman, your Honor please —as I said, it is within his field, he can tell just exactly what it is.

The Court: I say Dr. Pomeranz has told us what happened in the lung. I didn't know that it was disputed.

Mr. Turtur: Well, what I want to bring before the court and the jury is the chain of events and causation. Now, certainly it cannot hurt the case.

The Court: I am bound by the rules of evidence in courts of law.

[fol. 337] Mr. Turtur: Well, I know that, I am bound by that too, your Honor please.

The Court: I sustain the objection. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Turtur: Will your Honor pardon me just half a moment?

Q. What is the pathology of the lung, Doctor, due to an abscess?

Mr. Rudner: Your Honor please, I object to that on the ground pathology gives a specific situation.

The Court: You may answer.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. The destruction of lung tissue is brought about by either an obstruction to the bronchial tree or the subdivisions of the windpipe and that happens in most cases after operations on the nose and throat particularly.

Q. Say that again. After what?

[fol. 338] A. After operations on nose and throat particularly. It also may happen following——

Mr. Rudner: Your Honor please, that is not the question. The Doctor has been asked as to the particular pathology.

The Court: I don't see how this is enlightening. We have had, and no one disputes, the effect of an abscess in the lung. Now, the jury are not medical students, they don't want to be told scientifically what the effect is; it is very hard for them. We heard Dr. Pomeranz who has told what the symptoms were. No one denies them,—shortness of breath, loss of weight, illness, fever, everything. We have gone over it time and time again.

Mr. Turtur: Very well, your Honor, I will withdraw Dr. Casilli.

The Court: All right, Thank you, Doctor.

John E. Runnells, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

The Court: How long have you been admitted to practice medicine, Doctor?

The Witness: 30 years.

The Court: What are you a graduate of?

[fol. 339] The Witness: Tuffts Medical College and Boston University.

The Court: Do you practice in Elizabeth?

The Witness: I practice in Scotch Plains.

The Court: What institutions are you connected with?

The Witness: Union County Tuberculosis Sanitarium.

The Court: What are you, Superintendent, Doctor?

The Witness: Superintendent and Medical Director.

The Court: How long have you been that?

The Witness: 24 years.

The Court: How large a sanitarium is that?

The Witness: 375 to 378 patients.

The Court: Are any of those patients suffering from lung abscesses?

The Witness: Occasionally, yes, sir.

The Court: How many of them would you say?

The Witness: Perhaps we get three or four during the year.

The Court: Any further questions on qualifications?
Mr. Turtur: I have none.

[fol. 340] By Mr. Turtur:

Q. Doctor, did you at my request make a physical examination of George Matey?
A. Yes, I did.
Q. And when was that, please?
A. It was in September, 1935, September the 25th, 1935.
Q. What did your examination reveal, Doctor?
A. It revealed in my opinion he was suffering at that time from a pulmonary abscess.
Q. Did you also make an examination of the X-rays, Doctor?
A. I did.
Q. And what did the X-rays reveal?
A. I came to the same conclusion.
Q. When did you next examine him, Doctor?
A. Well, quite recently, within the last month, I think.
Q. And what was his condition when you next examined him?
A. It seems to be progressively worse; there seemed to be more involvement of the lung and his symptoms had gradually increased, very much more, apparently more emaciation, and it seemed to me that he was progressively worse.
Q. And what was his weight approximately, Doctor?
A. Oh, I think perhaps between 90 and 100 pounds, some-[fol. 341] where around there.
Q. Did he have any cough?
A. Yes, he had a profuse cough and a profuse expectoration; it was quite foul in odor and the cough seemed to be continuous. He had to lie on one side alone, on the left side, and his cough was continuous practically. He had very marked clubbing of the fingers.
Q. What does clubbing of the fingers indicate?
A. A chronic pulmonary inflammation, irritation long continued.
Q. What have you to say, Doctor, from your two examinations of the man and as you observed him, as to the probability of the extent of his life?
A. Why, I believe unless something can be done for him that his duration of life is rather short.

Q. How short approximately?

A. That is pretty hard to say, perhaps six months, perhaps longer.

Q. Now, Doctor, assuming that this man was in good health, in perfect health as a matter of fact in 1928, and he went to work for the Grasselli Chemical Company as a furnace man in 1928 and worked as such until about 1930, the latter part of which he began to notice a pimple in the back of his neck——

The Court: Before you go into that, Counselor, Dr. Runnells, [fol. 342] have you ever had any experience in your institution or otherwise with patients who have become ill through the inhalation of dust particles, any kind of dust particles?

The Witness: Well, if you allow silicosis and——

The Court: I mean—just answer my question.

The Witness: Yes, sir, I think so.

The Court: What kind of dust?

The Witness: We have had several cases of silicosis and we have also had cases of veterans who have suffered from inhalation of gases during the war, quite a large number of those.

The Court: Well, silicosis, as I understand it, is a disease which results in the hardening of the lung fibers, doesn't it?

The Witness: Yes.

The Court: Correct?

The Witness: Yes, the inhalation of silicates.

The Court: But the silicate type hardens the lung fiber?

The Witness: Yes, practically so.

The Court: And of course chlorine gas, which was a gas [fol. 343] during the war, what effect does that have?

The Witness: It produces a chronic inflammatory condition of the bronchial mucous membrane, also of the air cells of the lungs, and of course the final result is fibrosis, contraction of the air cells and difficulty in breathing, emphysema, continued coughing and some bronchitis with expectoration.

The Court: Have you ever had any experience in cases of persons who have inhaled this soda ash that you have heard talked about?

The Witness: I cannot recall any, no, sir.

The Court: Have you ever made any study of the subject?

The Witness: No, sir.

The Court: Aren't there those who have?

The Witness: Well, that doesn't always come into our field. Our field is that of diagnosis and treatment. We accept what the chemists say as to the causes or origin of these conditions. If such a case came to me I certainly would not go into the chemical studies of the cause of the disease. Mine would be chiefly to try to alleviate his condition.

The Court: But you are being called, Doctor, to testify [fol. 344] as to cause of this case, aren't you?

The Witness: I think I am called to testify as to whether this man has suffered from long continued irritation of his pulmonary and bronchial mucous membrane from whatever cause. I don't think that I—at least I didn't understand that I was expected to give any testimony as to the effects of the chemical on the pulmonary tissues.

The Court: Aren't there those who could give it?

The Witness: I think only the chemist, I don't believe a man in general practice can do so, or even a lung specialist, unless he has had special training in chemistry and pathology.

The Court: You see, the difficulty is, Dr. Runnells, that abscesses, you will agree, can be brought about from many causes, can't they?

The Witness: There are many causes, yes.

The Court: I mean just state, for instance, two of them.

The Witness: They can follow pneumonia, they can follow operations around the mouth, a large percentage do, the removal of tonsils, the extraction of teeth; they are present in malignant diseases of the lung, they are also present in [fol. 345] other bacterial conditions, several of them, and they can occur, at least in my experience, without any of those causes, at least we cannot find the cause. There are abscesses but sometimes it is extremely difficult to say what the cause was.

The Court: Now, in this case this man, as you have heard, worked in a plant where there was at least, according to his side of the case, a certain amount of this soda ash in the air. Why do you think, if you do think, that that had any relation to his abscess?

The Witness: If you grant that this was the condition and he did inhale the soda ash and it produced the corrosive effect that has been testified, then he would have had a long continued chronic inflammatory condition of his bronchial mucous membrane and his lungs.

Mr. Rudner: What was the last part?

The Witness: And his lungs, the pulmonary tissue, and it would seem to me that if such condition did exist that most anything could follow.

The Court: Well, are there many cases reported in the journals of the effect of, for instance, caustic soda on the [fol. 346] lungs?

The Witness: I cannot recall any, no, sir. If you will allow me to say so——

The Court: Yes, we are trying to get at the truth. Go ahead, Doctor.

The Witness: I saw a case about two weeks ago who worked for the Calco Chemical Company and the diagnosis was pulmonary abscess, both by physical signs and X-ray, in which we could discover no reason except that he had worked in Calco Chemical Company.

The Court: What is, the nature of—is there any dust there?

The Witness: Yes, in the dust, yes.

The Court: What chemical?

The Witness: I don't know what the chemical was but that is one specific case that I can give you; that is the only one that I know.

The Court: You don't know how much or how long an irritation would have to exist in the lung tissue?

The Witness: Well, I think if the irritation is long continued it might precipitate it at any time by most any event.

The Court. How much dust would have to be in the lung [fol. 347] tissue, deposited on the lung tissue?

The Witness: I cannot tell you that, sir. We get lung abscesses from the deposit of foreign substances, swallowing various materials that get down into the bronchial tree and land in the lung, such as swallowing peanuts or small objects of that kind, they even result in pulmonary abscesses, but a pulmonary abscess usually follows some chronic irritation of the lung.

Mr. Rudner: Now, if your Honor please, I don't want to interfere with your Honor's questions——

The Court: You can move to strike out.

Mr. Rudner: I move to strike the Doctor's testimony.

The Court: I don't see how we can get, Mr. Rudner, any closer approximation of the testimony than that. The Doctor has told his honest belief.

Mr. Rudner: It is substituting speculation for facts.

The Court: The Doctor has given it as his opinion that if there is this irritation from caustic soda, that that might be a producing cause of the abscess, isn't that correct, Doctor?

The Witness: Yes, sir.

[fol. 348] Mr. Rudner: The Doctor is testifying from casual hearing of witnesses and without hearing the testimony, hearing a little this morning, and is predicating his conclusions on that. I submit, sir, that is not a proper basis for any conclusions and the Doctor frankly says he does not know the extent of these caustic sodas or their special effects; all he deals with is treatment of lung conditions as he finds them.

The Witness: I do say that I think anything that will produce a chronic irritation of the lung may produce an abscess.

Mr. Rudner: I heard what you said, Doctor, but I submit that the basis of the Doctor's testimony has not been laid.

The Court: The testimony the Doctor heard this morning —you heard the testimony of the chemist, Dr. Gettler?

The Witness: Yes.

The Court: He based his opinion on that.

Mr. Rudner: I move, sir, that the testimony of Dr. Runnells with respect to the possible cause be stricken.

The Court: He didn't say possible cause, probable.

[fol. 349] Mr. Rudner: Well, I move, sir, that all testimony be stricken out except that part where he testifies as to what he found on this man's first and second examination, but as to possible or probable cause, as your Honor suggests, I move that all testimony be stricken out.

The Court: Motion denied.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

By Mr. Turtur:

Q. So that, Doctor, the condition in which you found him, taking into consideration all the other factors given to you, you say that the condition which he is suffering from is the natural and probable result of the irritants which he was subjected to since 1928?

Mr. Rudner: I object. The Doctor made no such statements. He says there are numerous causes from which pulmonary abscess may come. I submit, sir, the question is based upon speculation, that Dr. Runnells' testimony in that respect is based on speculation.

The Court: Dr. Runnells was very frank in saying [fol. 350] so.

Mr. Turtur: Dr. Runnells doesn't say it is speculation. Your Honor very ably brought out what Dr. Runnells' experience is. He is a man who is a lung specialist known throughout the east. What can I bring you? If you give the Doctor a hypothesis—he didn't know Matey in 1928, he must assume, of course, that the hypothesis is correct, and the only way that a lung specialist like Dr. Runnells can give an opinion is by taking into consideration the hypothesis given in a particular question and then to express his opinion.

Mr. Rudner: If your Honor please, I go further than that. Dr. Runnells has apparently testified not only in connection with the question being propounded but in connection with testimony offered by other witnesses. That is no proper foundation for a hypothetical question or any other kind of question. I go further, I say Dr. Runnells is very frank in stating that it happens from many other causes, pulmonary abscess. There has been no basis or foundation laid for the question; it is speculative.

The Court: If you want a hypothetical question you had [fol. 351] better put it, Counselor.

Mr. Turtur: All right, I will start from the very beginning, Mr. Rudner.

By Mr. Turtur:

Q. Doctor, assuming that the man in perfect health in 1928 started to work for the Grasselli Chemical Company as a furnace man, around furnaces, where he became very much perspiring by reason of the excessive amount of heat produced by these furnaces; that from 1928 to 1930 he did not feel any ill effects; that some time in 1930 he began to feel a pimple in the back of his neck and irritation along his face and hands; that thereafter he was operated on as a result of what he thought was a pimple, it being a carbuncle, and he was confined to the Elizabeth General Hospital for approximately seven weeks and then five weeks at home; that thereafter he was again sent back into the silicate department where he was exposed to soda ash and to sand and to silicate and the exposure was such, Doctor, that it was so heavy at times that it was almost like smoke and that you couldn't see your fellow worker from one end of the room to the other—that is what the testimony shows—and that in the latter part of 1931, Doctor, he began to feel a coughing sensation and started to lose weight, sweet-sour taste to the mouth, feverish, coughing, general debility, lack [fol. 352] of appetite, unable to sleep, pain in the chest, in the right lung region, loss of strength and increased respiration and shortage of breath, chills and fevers; that the cough became progressively worse; that some time in the year 1932 he was given treatments for dermatitis and it was so bad that fluid was oozing out from underneath his arms; that some time in the year 1932 while having this condition he was transferred from the silicate department where he had been subjected to this soda ash and sand and silicate to working in another department, working three days outside where he was also working among an irritant where he had —for three days outside and two days inside, that the two day period for a little while he was working in a so-called phosphate of soda department; this phosphate of soda consisted of phosphate rock where they dumped it into a certain chute and caused a lot of dust and then the man would be required to go within the plant approximately once every hour for eight times a day, and while so exposed, in the back of this department there was a bin wherein there was this dry soda ash and when this soda ash was being manufactured or stored, as the case may be, there was also a lot of dust and he was also subjected to that; again, Doctor, he got some skin rash again and that continued so that in the year 1933, the end of October or the beginning of No-[fol. 353] vember he was examined by a company physician and inguinal hernia, the rings were becoming weak, and he was told to be careful of those rings and the cough became worse and worse, so that in around Thanksgiving time of .933 he became so disabled that he could not work any longer; that in November of 1933, about that time, his condition was such with the skin rash that the company put him under a special skin man to be treated by the company; the company sent him to the specialist from November of 1933 until approximately some time in February of 1934; then he was told by the Assistant Superintendent that no job could be given to him there in that the chemicals would hurt him and that if he came back when it was cold they would see what they could do for him; that in July approximately 1934, the hernia finally came out, always bearing in mind this cough, and he was operated on for this hernia, given an anesthesia when he was operated on for this hernia; he remained in the hospital for approximately seventeen days, and during the seventeen days' period there was no sputum with any pus that came up and he went home and three days thereafter he felt something coming up, this sputum, this pus, and that since then, Doctor, he has been expectorating this sputum that you also saw in your examination the other [fol. 354] day for approximately one pint or more; that thereafter, Doctor, he again entered the hospital and X-rays were taken and the X-rays showed the lung abscess; that thereafter he was confined to the Memorial Hospital in New York and he stayed there for approximately fifteen days and the diagnosis there was a lung abscess; that thereafter his condition became, as it did, always progressively worse until October of 1935 when he was again confined to the Alexian Brothers Hospital and some more X-rays were taken showing a larger area of the abscessed lung, and that since September of 1935 he has not at all gotten up from bed and has continued to be in bed down to the present time in the condition in which you saw him; bearing in mind, Doctor, the hypothesis just given to you, what is your opinion, that the condition which he is suffering from is due to and please, with a reasonable degree of certainty and probability?

Mr. Rudner: Now, if your Honor please, I object to that question. I don't think this doctor can answer that question nor can any other doctor answer the question.

The Court: You may answer. You may have an exception.

Mr. Rudner: May I state my reason?

[fol. 355] The Court: I understand them.

Mr. Rudner: May I have an exception?

The Court: Yes.

Mr. Rudner: There is an assumption of facts——

The Court: I think the testimony is accurately related, if you want to point that out—but my recollection was it was.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. It seemed to me that if the facts are as stated, the assumption that he was subjected to a constant chemical irritation, that so affected his skin, it would also probably produce the same effect upon his pulmonary and mucous membrane, provided it was inhaled.

Mr. Rudner: I move that be stricken out because the Doctor in his answer predicates his conclusion upon the testimony of another witness.
Mr. Turtur: Oh, no, that was given in my hypothesis, your Honor.
The Court: Given in the hypothesis?
Mr. Rudner: Dr. Runnells says if these things would have that irritating effect upon the tissue of the lung, as I under-[fol. 356] stood it he said that.
The Court: No, he didn't say that.
Mr. Rudner: Dr. Runnells answered to that effect.
The Court: Mr. Rudner, will you listen to Dr. Runnells' answer.

(Answer repeated by the reporter.)

Mr. Rudner: Now, Dr. Runnells is testifying in connection with the testimony of another physician about an irritating effect.
A. A chronic irritation of the lungs, I said before, produced from whatever effect, could probably lead to a pulmonary abscess.

Mr. Rudner: I still move, your Honor please, that the answer be stricken.
The Court: You may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. And you say that, Doctor, with a reasonable degree of certainty and probability?
A. I do.
Q. And that the condition of which he is suffering from is what you have just stated?
A. Yes, sir.

[fol. 357] Cross-examination.

By Mr. Rudner:

Q. Doctor, have you ever had any experience with soda ash powder or phosphate powder?
A. No, sir, I think I stated that I had not.

The Court: He did say it.

Q. Have you ever heard of a case of a man developing a pulmonary abscess from the inhalation of phosphate soda or soda ash?

Mr. Turtur: Pardon me, Mr. Rudner, will you pardon me just a moment? I want to ask the Doctor just one more question, please. I don't mean to interrupt.
Mr. Rudner: Go ahead.

By Mr. Turtur:

Q. Doctor, was there any sign of tuberculosis in this man?
A. I didn't think so; no, there is no reason to think there was.

Mr. Turtur: All right.

By Mr. Rudner:

(Question repeated by the reporter.)

A. No.
Q. What is the answer?
A. No.
Q. And I suppose you read the literature quite extensively [fol. 358] with respect to the various causes of lung abscesses and ailments, including pulmonary abscess?
A. I try to keep up.
Q. Well, you try to do as best you can. And during the course of whatever reading you have made you have found no such cases?
A. No, sir.
Q. How extensive has been your experience with respect to dust cases involving inhalation of dusts of various kinds? You have mentioned silicosis.
A. Only those I mentioned previously.
Q. Silicosis?
A. Yes, sir.

Q. That is, of course, something entirely different?

A. And if you allow the case I saw from the Calco Chemical Company.

Q. Well, now, you don't know what chemicals they made there?

A. No, I don't.

Q. Now, silicosis, of course, is something entirely different. You can tell by reading an X-ray whether a man has silicosis or not?

A. Yes.

[fol. 359] Q. I mean you have a very definite indication from the X-ray of a dust condition?

A. Yes.

Q. Have you examined the X-rays in this case?

A. I did.

Q. Did you find any suggestion from the X-rays themselves about a dust condition being the cause?

A. You couldn't find any evidence of it from an X-ray.

Q. That's right; you didn't in this case?

A. I did not.

Mr. Turtur: He said, Mr. Rudner, that you couldn't.

Mr. Rudner: I understand.

Mr. Turtur: From an X-ray.

Q. And you didn't in this case. There are, however, certain lung diseases which you can tell from an X-ray?

A. Certainly.

Q. Silicosis one?

A. Yes.

Q. Pneumo*no*coniosis?

A. Yes.

Q. And there are some others:

A. Tuberculosis, cancer, malignant diseases, tumors.

Q. In addition to the causes that you suggest for pul-[fol. 360] monary abscess can a pulmonary abscess follow an operation with a general anesthesia?

A. A general anesthesia; I think I stated that they did follow very frequently operations around the mouth.

Q. Have you borne in mind the fact that this man did have an operation with a general anesthesia?

A. Yes, sir.

Mr. Turtur: He says around the mouth, Mr. Rudner.

Q. Well, now, this man had a hernia operation with a general anesthesia?

A. Yes. That seems rather remote.

Q. That seems remote?

A. Yes.

Q. Now, if this irritating effect came about, as you are assuming in that question propounded to you, in your answer, would the same irritating effect come about in the mouth and in the nostrils and in the closed respiratory organs?

A. I think so, I think it would, yes, sir.

Q. And so, if that irritating effect of which you spoke came about in the lungs, would it also necessarily have to show in the nostrils, in the organs leading from the nostrils to the lungs?

A. I think if you saw it at the proper stage it would.

[fol. 361] Q. Pardon me?

A. I think if you saw the condition at the proper stage it would.

Q. So that do you think the condition of the lung, that irritating condition of the lung, could come about unless at the same time and in connection with that irritating condition of the lung there is an irritating condition of the nostrils and the other respiratory organs leading to the lung?

A. Yes, I think if there was at the same time——

Q. It would have to come out at the same time?

A. Yes, but I think the inflammatory condition would disappear sooner from the mouth and nose than it would from the pulmonary tissue.

Q. Now, assuming, Doctor, there has at no time been any proof of any inflammatory condition in the mouth or the nostrils or in the respiratory organs leading to the lungs——

A. Assuming——

Q. —assuming there is no proof in this case of any inflammation in the mouth or in the nostrils or in the respiratory organs leading to the lungs——

Mr. Turtur: I object to the question.

The Court: He may answer.

A. Yes, I think there has been. The whole course demon-[fol. 362] strated there must be something, if the testimony is correct; he has had cough and expectoration and fever and streaked sputum and all of those things.

Q. Please, Doctor, answer my question. Assuming, and I say there is no proof in this case from any witness——

Mr. Turtur: I object to what he says. The Doctor says that the symptoms given to him in the hypothesis indicate that these conditions were present.

Q. Doctor, may I ask you this: Assuming that there is no evidence in this case of any inflammation of the mouth or the nostrils or the other respiratory organs leading to the lungs, what do you then have to say with respect to your previous answer?

Mr. Turtur: The Doctor—pardon me, your Honor——

The Court: Assuming it. Don't go into the question of whether there was or was not.

A. Of course, if the man was perfectly normal, he had nothing the matter with him, he has got to be normal, if he has normal tissues, normal nose and throat and normal bronchial mucous membrane, there cannot be anything.

Q. Then you mean your conclusion would be changed as to the cause of the lung abscess?

[fol. 363] A. Why, certainly.

Q. If we assume ~~no~~ evidence, no condition of inflammation of the nostrils and the mouth, your conclusion about this condition being the result of inhalation of this dust would be different?

A. You first include in that question inflammation of the bronchial mucuous membrane of the lungs.

Q. I don't know whether we are straight yet.

The Court: Yes, we are.

Mr. Turtur: You want him to answer your way but the Doctor wants to give you—what is the new question, Mr. Rudner?

The Court: I don't know whether you heard the answers, Mr. Rudner. He answered you fully.

Mr. Rudner: I heard the answer, your Honor, but I don't think it was responsive.

The Court: I thought it was.

Q. Is your previous conclusion with respect to the possible cause of this man's condition influenced at all by the assumption that this man did have an inflammation of the mouth and the nostrils and the respiratory organs leading to the lungs?

The Court: Yes, he answered that it was influenced.

Q. So that, if we eliminate that your conclusion would [fol. 364] be different:

The Court: Yes, he answered yes.

Mr. Rudner: Now, based upon that I move that Dr. Runnells' testimony with respect to his condition be stricken on the ground there is no proof whatsoever in this case of any inflammation of the mouth or nostrils or other respiratory organs leading to the lungs.

The Court: You may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Now, Doctor, assume that Mr. Matey was examined by a physician in the latter part of October, 1933, as to his chest and had a chest expansion of I think at least 2½ inches, no rales found and no symptoms of a lung inflammation involvement found; assume further that at the time of his operation in June, 1934, and prior to the operation, he was examined by a physician as to his lungs and his lungs were found entirely clear; what then do you have to say with respect to your answer to the hypothetical question submitted to you by Mr. Turtur?

Mr. Turtur: I object to the question.

The Court: No, you may answer. You may have an [fol. 365] exception.

Mr. Turtur: That is not in the proof, your Honor please.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. I think that inflammatory condition could have been present without any of those symptoms at all. You cannot hear a great many things that are present in the chest even in an abnormal condition.

Q. Your answer is still the same?

A. Yes.

Q. Do rales mean anything with respect to a lung abscess?

A. They are an indication of softening of the lung, breaking down.

Q. And if no evidence of rales on a stethoscopic examination appeared, would that indicate a more or less normal chest?

A. No, you could still have a pulmonary abscess without the rales.

Q. Assume further, Doctor, that this man did not complain of any cough to the physicians in October, 1933, or at the time of his operation in June, 1934——

Mr. Turtur: Well, I object to that because, your Honor [fol. 366] please, there is distinct evidence in the testimony that he had this cough condition when he entered the hospital.

The Court: Let me put the question this way, Doctor: Assume he had no cough, would your answer be different?

The Witness: No, it would not, Judge. I think an inflammatory condition could still have been present without a cough at that time. There could have been a lull in the condition, perhaps he was resting in bed for a long time and conditions had become somewhat quiescent.

The Court: The fact is he was not resting in bed.

The Witness: I understood he was in the hospital.

The Court: Supposing now that he was up and about and still had no cough, would your answer be different?

The Witness: No, sir, it would not.

Q. You mean if there is no inflammation in the mouth your answer would not be different?

A. No, sir.

Q. It would be the same?

A. Yes.

Q. If no inflammation of the nostrils your answer would [fol. 367] be the same?

The Court: No.

Mr. Turtur: This is out, your Honor, you ruled on that before.

Q. If no inflammation of the nostrils——

The Court: He has already said if there was no inflammation of the nostrils his answer would be different.

Mr. Rudner: Oh, would be different.

Redirect examination.

By Mr. Turtur:

Q. What do you mean by inflammation, Doctor? Just let me ask you that question, of the mouth.

A. Redness, swelling, &c., exudate of moisture from the mucous membrane.

Q. But in the question I gave you, Doctor, it did indicate that he had those things present?

A. Yes.

Mr. Rudner: Now, your Honor——

The Court: I sustain the objection.

Mr. Rudner: I move the answer be stricken out.

The Court: Doctor, did you examine him with reference to redness of the mouth?

The Witness: No, sir.

[fol. 368] Q. But with all the symptoms I gave you in the hypothesis what did that indicate to you?

Mr. Rudner: I object. We are basing it on specific facts.

The Court: Sustained. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

The Court: That's all, Doctor, Thank you very much. Have you other physicians.

Mr. Turtur: Yes, your Honor.

The Court: Are they here?

Mr. Turtur: Yes, your Honor.

The Court: How many please?

Mr. Turtur: Well, I have one more here.

The Court: Then have you others after that?

Mr. Turtur: Well, I thought I would rest.

The Court: I am not trying—I just want to tell Mr. Rudner. He must be prepared to go on with his witnesses this afternoon. Have you witnesses?

Mr. Rudner: Yes. I will have a motion to make; it will take some time to make it.

[fol. 369] The Court: What?

Mr. Rudner: I have a motion to make.

The Court: I have no doubt.

(Recess.)

Afternoon Session

The Court: Put the doctor on, please.

I. **Edward Gluckman**, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Dr. Gluckman, are you a practicing physician of the State of New Jersey?

A. I am.

Q. And have been so for how long?

A. About 32 years.

Q. And what field or branch of medicine have you specialized in?

A. Heart and lungs, lungs particularly.

Q. And for how many years has that been?

A. Since 1907.

Q. And as such a specialist, Doctor, would you be so kind as to tell us what institutions have you been connected with [fol. 370] and which are you connected with?

A. I am president of the Consultant and Advisory Staff of the Essex County Sanitorium, former superintendent of that institution, in fact I started back in 1907; former vice-president of the State Sanitorium at Glen Garden; consulting physician Board of Education on Tuberculosis; visiting physician to Deborah Sanitorium; consulting physician Beth Israel Hospital on tuberculosis. I guess that's about all I can think of.

Q. Well, do you have more, Doctor?

A. They may come to me a little later.

Q. Now, Doctor, did you at my request make an examination of George Matey?

A. I did.

Q. When, please?

A. October 23, 1935.

Q. And as a result of your examination what did you find?

A. Found the man suffering from an abscess of the lung, the right lung.

Q. Now, Doctor, assuming that the man in perfect health in 1928 started to work for the Grasselli Chemical Company as a furnace man, around furnaces, where he became very much perspiring by reason of the excessive amount of heat [fol. 371] produced by these furnaces; that from 1928 to 1930 he did not feel any ill effects; that some time in 1930 he began to feel a pimple in the back of his neck and irritation along his face and hands; that thereafter he was operated on as a result of what he thought was a pimple, it being a carbuncle, and he was confined to the Elizabeth General Hospital for approximately seven weeks and then five weeks at home; that thereafter he was again sent back into the silicate department where he was exposed to soda ash and to sand and to silicate and the exposure was such, Doctor, that it was so heavy at times that it was almost like smoke and that you couldn't see your fellow worker from one end of the room to the other—that is what the testimony shows—and that in the latter part of 1931, Doctor, he began to feel a coughing sensation and started to lose weight, sweet-sour taste to the mouth, feverish, coughing, general debility, lack of appetite, unable to sleep, pain in the chest, in the right lung region, loss of strength and increased respiration and shortage of breath, chills and fevers; that the cough became progressively worse; that some time in the year 1932 he was given treatments for dermatitis and it was so bad that fluid was oozing out from underneath his arms; that some time in [fol. 372] the year 1932 while having this condition he was transferred from the silicate department where he had been subjected to this soda ash and sand and silicate to working in another department, working three days outside where he was also working among an irritant where he had—for three days outside and two days inside, that the two day period for a little while he was working in a so-called phosphate of soda department; this phosphate of soda consisted of phosphate rock where they dumped it into a certain chute and caused a lot of dust and then the man would be required to go within the plant approximately once every hour for eight times a day, and while so exposed, in the back of this department there was a bin wherein there was this dry soda ash and when this soda ash was being manufactured or stored, as the case may be, there was also a lot of dust and he was also subjected to that; again, Doctor, he got some skin rash again and that continued so that in the year 1933, the end of October or the beginning of November he was examined by a company physician and inguinal hernia, the rings were becoming weak, and he was told to be careful of these rings and the cough became worse and worse, so that in around Thanksgiving time of 1933 he became so disabled that he could not work any longer; that in [fol. 373] November of 1933, about that time, his condition was such with the skin rash that the company put him under a special skin man to be treated by the company; the company sent him to the specialist from November of 1933 until approximately some time in February of 1934; then he was told by the Assistant Superintendent that no job could be given to him there in that the chemicals would hurt him and that if he came back when it was cold they would see what they could do for him; that in July approximately 1934, the hernia finally came out, always bearing in mind this cough, and he was operated on for this hernia, given an anesthesia when he was operated on for this hernia; he remained in the hospital for approximately seventeen days, and during the seventeen days' period there was no sputum with any pus that came up and he went home and three days thereafter he felt something coming up, this sputum, this pus, and that since then, Doctor, he has been expectorating this sputum that you also saw in your examination the other day for approximately one pint or more; that thereafter, Doctor, he again entered the hospital and X-rays were taken and the X-rays showed the lung abscess; that thereafter he was confined to the Memorial Hospital in New York and he stayed [fol. 374] there for approximately fifteen days and the diagnosis there was a lung abscess; that thereafter his condition became, as it did, always progressively worse until October of 1935 when he was again confined to the Alexian Brothers Hospital and some more X-rays were taken showing a larger area of the abscessed lung, and that since September of 1935 he has not at all gotten up from bed and has continued to be in bed down to the present time in the condition in which you saw him; bearing in mind, Doctor, the hypothesis just given to you, what is your opinion, that the condition which he is suffering from is due to and please, with a reasonable degree of certainty and probability?

Mr. Rudner: If your Honor please, in the first place, I don't know that Dr. Gluckman has made any statement with respect to his experience in dust inhalation cases.

The Court: Have you had any, Doctor?

The Witness: Dust cases?

The Court: Yes.

The Witness: I have had about over three hundred silicosis cases.

The Court: I knew the answer was yes. The doctor has appeared before.

Mr. Rudner: How about soda ash and phosphate?

[fol. 375] The Witness: Not particularly soda ash or phosphate, any irritants.

Mr. Rudner: I mean have you ever had any experience with soda ash or phosphate powder dust?

The Witness: Not particularly that, no.

Mr. Rudner: Your experience has been with respect to silicosis based upon a silicate dust, which is an insoluble?

The Witness: Silicosis, asbestosis.

The Court: Have you had any case, Doctor, of abscess?

The Witness: Of the lung?

The Court: Yes.

The Witness: Oh, yes.

The Court: No, I mean as a result of dust.

The Witness: As a result of dust? Well, out of these silicosis cases there were three or four abscesses that formed in these cases following the silicosis.

The Court: In the silicosis were the abscesses in those cases due to irritants?

The Witness: They were due possibly to some irritation [fol. 376] in the lung; whether it was the silica in itself you cannot tell.

The Court: How do you mean you cannot tell?

The Witness: You cannot tell with a positive degree of certainty that they were. There was an irritation there and that irritation may have weakened the condition to such an extent that it broke down and formed the abscess.

Mr. Rudner: May I ask the Doctor; Have you ever had any cases involving phosphate of soda dust or soda ash dust?

Mr. Turtur: I object, your Honor please. He has already answered that he has had cases involving irritants but not particularly with the words "soda ash."

The Court: The answer to your answer is no, Mr. Rudner:

Mr. Rudner: That is what I thought, Doctor. Your answer is no. Then I object to the question, your Honor please, on this ground: it contains statements or assumptions which are not in accordance with the record, or at least the facts that have been suggested by the plaintiff's witnesses. To particularize I will mention them. The hypothetical question contains a statement to the effect [fol. 377] that while working on the outside with the phosphate rock he was subjected to an irritating chemical. That is not the fact. He had the phosphate rock when he was outside. You cannot ventilate outside. Second thing is to the effect that he was subjected to dust in the phosphate department from some bin or something. There is some proof about that but not to the extent which the question suggests. The hypothetical question also suggests that the skin ailments are directly attributable to the—whether it is soda ash dust or phosphate dust, there is no proof of that as far as the record is concerned.

The Court: It doesn't suggest, it states the fact. You may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: Now, there is one more. It also contains this statement, that somebody told him that the chemicals would hurt him. There is no such thing in the record on the part of the plaintiff in his testimony, that he was told to come back some other time or was told to go because [fol. 378] the chemicals may hurt him.

The Court: I thought there was such testimony.

Mr. Turtur: There is, your Honor please, and I am ready to show it.

The Court: That is my recollection.

Mr. Turtur: It is.

The Court: You may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Will you answer the question that has been asked?

A. I believe that this condition is due to the inhalation of some irritant which caused a bronchial condition in his lung and the breaking down of this bronchial condition caused the abscess.

Q. Now, Doctor, are there some peple, from your experience of so many years, that are more susceptible to irritan-s than others?

A. Absolutely.

Q. There are people who are more susceptible?

A. Positively.

Q. That is all.

[fol. 379] Cross-examination.

By Mr. Rudner:

Q. Dr. Gluckman, you are still connected with the Glen Gardner?

A. Not any more. I was vice-president for 15 years.

Q. Now, Doctor, you of course knew you were coming into court to testify in this case today. Have you read any medical journals or medical books or anything else in connection with the inhalation of any phosphate soda dust or soda ash dust and as to whether you have found any cases where an abscess resulted from such inhalation?

A. I haven't read anything on that subject because I don't think there is very much on it. I haven't seen very much on it in my time.

Q. Have you ever heard of a case of an abscess of the lung resulting from inhalation of soda ash dust or phosphate of soda dust?

A. I cannot specifically say that soda ash or phosphate of soda was the irritant in these——

Q. I am talking about those two dusts.

A. No, I cannot say that positively. This was the first time that I have ever seen soda ash or phosphate of soda chemically analyzed and a report given by a man like Dr. Gettler.

Q. Now, in any event, you have never heard of a case [fol. 380] of a lung abscess in connection with soda ash or phosphate of soda?

A. No.

Mr. Turtur: I object to that, your Honor; it makes no difference.

Q. Now, Doctor, have you taken into consideration the fact that this Mr. Matey—he is the gentleman you examined last fall—that Mr. Matey has no irritation or inflammation in the nostrils, the mouth or the respiratory organs leading from the nostrils and the mouth to the lungs?

A. According to his history that he gave me I should say that he did have an irritation to those.

Q. Well, now, Doctor, please assume what I am saying, that there has at no time been an irritation or inflammation of the nostrils, mouth or the respiratory organs leading to the lungs——

Mr. Turtur: I object to the question, your Honor please, because the evidence so far is that there was this irritation, your Honor please, and of course the Doctor——

The Court: Are you going into this, ask him the same question you asked the other doctor? Do you want to find out about the coughing; I mean do you want to find out his [fol. 381] answer will be different, if there was no irritation of the mouth and nose? Is that it, Mr. Rudner?

Mr. Rudner: Absolutely no testimony in that respect in this case.

The Court: There is testimony by Matey himself that he coughed.

Mr. Rudner: That's right.

The Court: There is testimony by his fellow-workmen that he coughed; to that extent there is testimony of irritation of the mouth and nose. If the jury believe after hearing your witnesses that that testimony on the part of Matey and his workmen is fa[illegible] of course there cannot be any verdict for Matey.

Mr. Rudner: But, your Honor please, the cough may have come about through an irritation in the lung aside from anything else.

Q. Doctor, are there some effects which can cause a cough from the lung aisde from the mouth and nostrils?

A. Why, certainly, you can have a cough from an irritation in the lung itself.

Q. You cannot?

A. You can.

[fol. 382] Q. I mean you can have a cough from irritation in the lung without having irritation in the mouth or nostrils?

A. Certainly.

Mr. Rudner: Now, if your Honor please, that being Dr. Gluckman's answer, I submit, sir, that my question is entirely proper.

The Court: Sustained. Frame it in the same manner that you framed the other one.

Mr. Rudner: That was the last question. Dr. Gluckman just gave the answer.

The Court: I sustain the objection. You may have an exception.

Defendant's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: Your Honor, may I ask that Dr. Gluckman's statement be read, the very last statement of Dr. Gluckman?

The Court: I heard it.

Mr. Rudner: He did say that a man could have a cough——

The Court: Well, is, Dr. Gluckman, a cough sometimes [fol. 383] evidence of an irritation in the mouth and nose?

The Witness: Absolutely.

Mr. Rudner: Yes, but the Doctor did say——(interrupted)

The Court: Then I will add that in my charge to the jury. If they find that he had a cough and if they further find that it is evidence of an irritation in the mouth and nose—of course, if he had no cough, under the last witness' testimony, of course, he couldn't have possibly acquired this lung condition from the dust.

Mr. Rudner: But, your Honor please, the Doctor has testified that it can be a cough arising from irritation of the lungs without being an irritation from the mouth or nostrils.

The Court: Are you hearing me, Mr. Rudner, because we don't seem to be talking——

Mr. Rudner: I am hearing you. Your Honor has overruled this last objection based upon the Doctor's statement. Do you overrule the objection or my question?

The Court: I sustain the objection to your question and you have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 384] Q. Doctor, can there be a cough, a constant cough, more or less constant cough, arising from an irritation of the lungs of some nature without there being an irritation to the mouth, the nostrils or the respiratory organs leading from the nostrils to the lungs?

A. There could be an irritation to the larynx, which is below the throat, that would cause the incessant cough without any irritation to the nose and mouth itself.

Q. That's right. Now, bearing in mind, then, Doctor, assuming that this man had no inflammation of the mouth and nostrils and had this more or less irritating cough, would your answer to the long hypothetical question be altered, taking into consideration the fact there was no inflammation of the nostrils and of the mouth?

Mr. Turtur: I object and your Honor has already sustained my objection.
The Court: ——

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.
William Clark. (Sealed.)

Q. Doctor, would your conclusions be at all altered by [fol. 385] the fact that in the history of this plant men being subjected to the same dust, the same conditions for at least as long as Mr. Matey, have at no time suffered any abscesses of the lungs or any irritating conditions in connection with the lungs?
A. That doesn't necessarily follow. This man may have been hypersensitive and probably was to the effect of this dust.
Q. Now, if I told you to assume, Doctor, further that in a plant where the soda ash is manufactured for a period of 35 years, where men have inhaled dust from soda ash and never in the history of that plant, over that period of time, has there been any case of injury to the respiratory organs or the lungs in connection with the inhalation of the dust——

Mr. Turtur: I object to the question.

Q. (Continuing.) —what then do you have to say in connection with your conclusion?

Mr. Turtur: Your Honor, I object to the question because it presupposes something that is not in the evidence. No. 1——.
The Court: Didn't he ask it before, the same question?
Mr. Turtur: No, but he is asking now——
Mr. Rudner: He asked it of the other doctor.
[fol. 386] Mr. Turtur: I withdraw the objection.

Q. Go on.

Mr. Turtur: I am assuming that Mr. Rudner will prove these things that he is now supposing to be the case.

Mr. Rudner: I will prove it, and the Doctor is right in court now from the institution I am talking about. He just happened to come in this afternoon.

A. All I can say, Mr. Rudner, is simply that among these cases one man may be affected and one hundred others may not be affected by the fumes. That has happened in silicosis, happened in all of these dust cases.

Q. Very true, sir. Doctor, have you finished? When we are dealing with thousands of men over a period of 35 years, sir, and no case of an injury to the respiratory organs or lungs has developed in a factory actually manufacturing soda ash, where there are dust conditions, isn't that rather anomalous where you have thousands of people?

A. True, but in this particular case you have probably thousands of men working there who weren't affected as far as the skin was concerned This man seems to be hypersensitive on account of the effect it had on his skin as [fol. 387] well as his lungs.

Q. Now, Doctor, what are the causes of lung abscess such as the type this man had?

A. Causes of it?

Q. Yes.

A. A good many abscesses are caused following chronic bronchitis, empyema, following operation of the nose and throat, especially tonsil operations. You get it from a blocking up of the bronchial tube, you get it following a bronchiectasis and any chronic disease of the lung may break down and form an abscess any time.

Q. I suppose an infection of some sort in the system would cause it?

A. You have got these germs in the system at all times and they may at any moment light up.

Q. That is what I am coming to. The human system is such that there are always germs in the system and in the lungs which have possibilities of developing into a lung abscess?

Mr. Turtur: I object to the possibilities, your Honor please. We are dealing with probabilities.

The Court: Yes, probabilities; amend that.

A. That is true.

[fol. 388] Q. And these germs of which you speak, they develop, do they not, in early childhood?

A. In early childhood.

Q. Or some time during the course of one's life?

A. You can get it any time during your life.

Q. Well, we all have that situation, do we not?

A. Absolutely.

Q. And we all have those germs in our system?

A. Yes, sir.

Q. And we get them sometimes in the course of our life and later on something may happen that may develop into an abscess or some other long involvement?

A. If our resistance becomes lowered they became active and develop into the abscess.

Q. And what arises from the fact that as we get to be adults our lungs are not entirely clear, are they, they have fibroses from natural causes?

A. Fibrosis, not from natural causes, no.

Q. Well, now, that comes from—a child has an infection, suppose the child has the measles or whooping cough or smallpox, doesn't that establish an infection in the system which may break out any time?

Mr. Turtur: Your Honor please, there was a specific question asked by Mr. Rudner when we were taking the [fol. 389] depositions of Mr. Matey——

The Court: You may answer.

Mr. Rudner: —he answered "I don't remember."

Mr. Turtur: He says he never had it. That is in the evidence.

A. It doesn't establish an infection but it may lower the resistance in that child's system and leave a bronchitis or something like that which may later develop into something of that sort.

Q. And all human beings, of course, have colds more or less often in the course of one's human life?

A. Naturally.

Q. And during the course of having a cold we develop lung cough, lung conditions?

A. Sometimes.

Q. That is more or less general?

A. Not necessarily, following an ordinary cold.

Q. A protracted cold?

A. A protracted cold is different.

Q. Bronchitis?

Mr. Turtur: There is no evidence in this case that the man had a protracted cold, there is no evidence that the man had a slight cold.

Mr. Rudner: Your Honor please, every human being has [fol. 390] bronchitis and colds.

Mr. Turtur: Your Honor please, I am sorry to object but we are going into absolute possibilities. There is nothing in the evidence—what do we care about a child that had these things? He doesn't give the Doctor——

The Court: Sustain the objection.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Doctor, have you told us all the causes of a pulmonary abscess? You mentioned quite a few of them.

A. I told you that an abscess may come from any chronic condition in that lung, any irritation that is severe enough to set up a bronchitis can later break down and form an abscess or bronchiectasis.

Q. And I suppose a man having an abscess, it is impossible to state particularly what caused it?

A. You cannot positively say what caused it, outside of the fact that if you have some sort of an irritant you have to conclude that that irritant had something to do with the irritation of that lung, allowing it to break down and form the abscess. If this man had a tubercular infection at the *[fol. 391] apex of his lung or in the middle of his lung* he would probably have developed an acute exacerbation of the tubercular condition by breaking down that resistance; following an irritation of this kind it may happen just the same.

Q. He had no tuberculosis?

A. No.

Q. We are all, of course, affected with tubercular germs?

A. Not necessarily; about 90 per cent of us are, more or less.

Q. How many?

A. 90 per cent.

Q. 90 per cent are more or less affected with the germ of tuberculosis?

A. We have probably a foci somewhere in our system.

Q. That's right, and it just needs a certain circumstance to develop it?

A. Right.

Q. Have you seen this man's X-rays at all?

A. Yes, I believe I did.

Q. You cannot tell from the X-rays, of course, what the causative factor was?

A. No.

Q. All you can tell is you think it might be an abscess?

[fol. 392] A. That the condition is there.

Q. You just saw Mr. Matey on this one occasion?

A. That's all.

Q. Last October, and haven't seen him since?

A. No.

Q. Doctor, you read very extensively, I know you do, in connection with chest diseases and diseases of the lungs, the textbooks and journals?

A. I have.

Q. And in all those readings you cannot tell us of a case ~~of~~ a lung abscess coming from inhalation of soda ash or phosphate of soda?

A. They could not positively say that it was soda ash or phosphate of soda or anything else. There was an irritation and that's all they could say that caused it, in all the cases that I have seen; they cannot positively say and pin it down specifically to one particular irritant unless that irritant was present, then they have to suppose that it had something to do with it.

Q. Aside from that, does the literature, the books you have read, speak of a lung abscess arising from, or a case showing a lung abscess arising from soda ash dust or phosphate of soda dust——

A. I remember one case of abscess of the lung following phosgene.

[fol. 393] Q. That is a liquid?

A. That is a gas, of course, but it was simply the irritation, that's all.

Q. That is a poisonous gas?

A. True.

Q. But I am limiting my question to soda ash dust——

A. I have not seen——

Q. —and phosphate soda——

A. Any specific cases of soda ash causing abscess of the lung, if that is what you want.

Q. And I know you state that from having read all this literature and books?

A. And my experience over thirty years.
Q. That's all, Doctor.

Redirect Examination.

By Mr. Turtur:

Q. But from your experience, Doctor, you have found these conditions due to irritants, haven't you?
A. I have.
Q. That's all. Just a minute, please, Doctor. And basing your supposition, Doctor, that this soda ash and phosphate of soda, &c., is an irritant, that is reason for your answer, is that so?
A. True.
Q. That is all.

[fol. 394] Recross-examination.

By Mr. Rudner:

Q. Doctor, is there any difference in connection with the irritant so far as soluble and non-soluble dusts are concerned?
A. Well, soluble dusts, if they are irritant enough, have a more drastic effect upon tissue of that kind that an *un*soluble dust, a non-soluble dust will cause an irritation which throws out sufficient fiber in order to cause a fibrosis where a caustic effect will break down and cause more of an abscess or a breaking down of tissue than the other will—that is the difference between the two that I have found.
Q. That is the connection generally between soluble and insoluble?
A. That is the connection that I find.
Q. That's all Doctor.

COLLOQUY

Mr. Tutur: Your Honor, Mr. Rudner has consented to stipulate that the amount expended by Mr. Matey so far was $654.60 and also hospital bill of $428.25 without the necessity of formal proof.
The Court: What were his wages?
Mr. Turtur: That is what I was going to call on now.

Your Honor, I offer in evidence the X-rays that were [fol. 395] produced here this morning as one exhibit, six of them.

(Received and marked Exhibit P-3.)

Mr. Turtur: And also offer in evidence all of the chemical exhibits that were offered during the time that the depositions were taken.

(Received and marked Exhibits P-4 and P-10 inclusive.)

Mr. Turtur: Bills of $428.25 and $654.60——

Mr. Rudner: I might say for the record we are just waiving formal proof in connection with those items, so you can offer the items.

Mr. Turtur: Your Honor please, I also have a letter from the Memorial Hospital in New York to show that he was there confined without the necessity of formal proof and that the diagnosis was a lung abscess, is that all right, Mr. Rudner?

Mr. Rudner: I won't let that go in.

Mr. Turtur: There is no dispute about it.

Mr. Rudner: I am sorry, there is dispute, but I am not going to let any letter go in for that purpose. If you want figures, that will be all right.

Mr. Turtur: How about a bill, will a bill be all right?

Mr. Rudner: Oh, yes.

[fols. 396-397] Mr. Turtur: The bill was $68. I don't remember where it is now. Will you stipulate that that was $68 without the necessity of formal proof?

Mr. Rudner: $66. I don't object, without admitting anything. We just admit that he expended those moneys.

Mr. Turtur: Will you stipulate for the record too, Mr. Rudner, if you don't mind, what the wages were?

Mr. Rudner: Oh, yes, he worked five days a week, eight hours a day, 55 cents an hour, $22 a week, at the time he left the employment.

Mr. Turtur: It is stipulated, your Honor, that he was getting $22 a week at the time. Now, I offer in evidence, your Honor please, the questions that were propounded by the jurors while at the plant, and that were so kindly made up by the Clerk.

The Court: There is no authority for that.

Mr. Turtur: Well, I thought you wanted to make it a part of the record.

The Court: There is no authority for that.

Mr. Turtur: Very well, your Honor, I won't press that. The only thing I have, your Honor, is Mrs. Matey, who would [fol. 398] only testify as to the condition of the husband.

The Court: That is proved. Are the wages stipulated?

Mr. Turtur: The wages are stipulated to be $22 a week.

Mr. Rudner: Now, I have some motions to argue which may take some little time to argue. I would like to argue fully some phases which I think ought to be presented very fully to your Honor.

The Court: I will excuse the jury for fifteen minutes.

(Jury excused.)

The Court: I read both memorandums of counsel on the question of the statute of limitations. Mr. Turtur, for no reason that I can see, you submitted the same cases that I told you were not in point before. Mr. Geuther submits other cases but they are also not in point. Nobody that I can see has submitted the cases that I asked.

Mr. Turtur: Those cases, your Honor please, I got some of them from the section of Corpus Juris that your Honor——

[fol. 399] The Court: Well, they are not in point; you didn't get the cases in the footnotes that I read to you.

Mr. Turtur: They are——

The Court: They are not: I have compared those cases with your memorandum and they don't compare; there are no New Jersey cases.

Mr. Turtur: I ran them down to the present time, your Honor please.

The Court: You submitted some cases that I told you had no more to do with it than if they had been on the law of murder.

Mr. Turtur: Here, your Honor, is one I didn't submit, 115 Law 115, also Riegel vs. Kanengiser, 114 N. J. Law page 311, and cases therein cited.

The Court: You give me the same law. Am I very stupid or don't you understand me? The statute has run against your original cause of action as written. Now you are trying to prevent the running of the statute by changing the time. That is an entirely different question from submitting a memorandum of a case against which the statute has already run. Is that too complicated?

[fol. 400] Mr. Turtur: Now, your Honor please, I respectfully submit that at the time the complaint was filed the statute of limitations did not run against us and this amendment, the statute of limitations might run against, or if we were changing the cause of action. The only cause of action that we have here is what? It is the exposure to the inhalation of the chemical fumes, the metallic dust and all those other things.

The Court: I will not listen to any more argument on this case until I have the cases presented that I called for. That seems to be quite reasonable. If you are not willing to present them, I shall probably rule against you.

Mr. Turtur: Your Honor please, I am not only willing to produce them but I am exceedingly anxious to produce what your Honor has directed me to do.

The Court: Why not do so? Why again give me a series of cases dealing with amendments filed after time?

Mr. Turtur: No, they don't.

The Court: Yes, they do.

Mr. Turtur: Your Honor, may I show you that book, 37 in Corpus Juris, which refers you to some of those cases?

[fol. 401] Mr. Geuther: 49 is the volume.

Mr. Turtur: Then there is also one in 37 on pleadings and limitations of actions.

The Court: There are a number of cases I asked you for. I asked you to do something very simple.

Mr. Turtur: I did it.

The Court: To take those cases, find them in the Digest and run them down and you haven't done it.

Mr. Rudner: Your Honor please, may I make this observation? The other night, in pursuing this matter, I think I examined the legal question as to the legal effect of the statute of limitations, what is the legal significance of the statute operating against causes. I could get no better or more lucid authority than Judge Forman's recent decision in the radium cases.

The Court: It is not in point. I agree with you it is a most excellent opinion. Will you please do what I ask you to. Neither counsel seems to be willing to help assist the court in looking up a very simple proposition of law.

Mr. Turtur: These cases were looked up.

[fol. 402] The Court: Where are they?

Mr. Rudner: One is — vs. Lee, 26 Texas.

The Court: There was one in the Southeastern Reporter.

Mr. Rudner: One was Kansas.

The Court: They ought to have given you a clew to the matter, it seems to me.

Mr. Rudner: The question in that case was with respect to exact date as to whether it happened 18th of August of the 17th of August.

The Court: That is the same situation here.

Mr. Rudner: Oh——

The Court: The question——

Mr. Rudner: Excuse me, go ahead, I didn't mean to interrupt your Honor.

The Court: Go ahead.

Mr. Geuther: May I say this, if your Honor please, that our position is, not that that situation is the same as that which your Honor just mentioned—I hesitate to bring the point up because you are——

The Court: But you haven't furnished me with a single case that is anywhere near in point. I think in eleven years I have never been so badly advised by counsel as I have [fol. 403] in this case, never. That is a long time, and I have tried many cases.

Mr. Rudner: This is an unusual situation that we cannot find in the law of New Jersey but if you will refer to page 4 of the small memorandum that I have prepared——

The Court: I have read your cases, they are not in point in any way.

Mr. Rudner: Let me point out this to your Honor; the case on page 4 is this situation in which there was an allegation of a tort committed, in which the plaintiff laid his date as of, we will say, January 1st, 1932. He started his suit two years later but there was a one year's statute that applied to all tort claims of that character, so that when he started his suit he was barred. He brought it two years later when he should have brought it within the year. That is analogous so far or doesn't your Honor agree with that?

The Court: I do not.

Mr. Rudner: Your Honor, I think this statement of Judge Forman, to me, is dispositive of this. May I read it?

[fol. 404] The Court: I have read it, it has nothing to do with it.

Mr. Rudner: Suppose I read it, it might be of assistance to your Honor.

The Court: I understand, I have read that opinion several times.

Mr. Rudner: He cites this particular case.

The Court: I read that case. When I settled the radium cases I made a thorough examination of the law and I was satisfied that they could not recover legally.

Mr. Rudner: But in giving effect to the statute of limitations nothing that happens thereafter can change the situation.

The Court: That is childish. This is what happened, counsel says because the plaintiff couldn't talk to him he made a mistake in pleading. I don't believe that frankly but I don't care whether that is so or not. He pleaded a cause of action which is barred by the statute. He now says "I made a mistake due to the fact that I couldn't talk to my plaintiff." Our cause of action is not barred by the statute because the injury continued to a point within the statute." He asks to amend to include that. That is changing the time, that is increasing the time. It is no different [fol. 405] from if you take August 18, 1934 in your original complaint and the proofs show that as a matter of fact the accident happened on August 13, 1935. Now, if that isn't simple to the most childish man, I don't know what is.

Mr. Rudner: We go back and say that the cause of action as reflected in the complaint was barred on the very date——

The Court: So was the case I gave you, it is barred, of course.

Mr. Rudner: No, sir, I don't think that was the case. The case your Honor gave wasn't barred on that date. Those cases present a different situation. That is what I am trying to bring to your Honor's attention. Those cases in Corpus Juris which we examined, those cases, sir, were not barred on the date suit was started.

The Court: The very point is counsel says that the proof shows that the case was not barred and he is asking to amend to show to conform to the proof, that's all. Now, go ahead with your argument.

Motion to Strike

Mr. Rudner: My first motion will be this, your Honor [fol. 406] please—I know your Honor can rule very briefly on it because your Honor has passed upon it. My first motion is, sir, that the amendment as allowed by your Honor to include the phosphate department by way of addition to the silicate department be stricken from the record and that all testimony of all the plaintiff's witnesses, including the testimony of the plaintiff in his deposition, in so far as it pertains to the phosphate department, be stricken from the record. I think your Honor doesn't require any further argument on that question; the matter has been fully presented.

The Court: Put it on the record. I don't know the point of it but if you want to put a brief for the Court of Appeals at this time on the record I suppose that is your privilege.

Mr. Rudner: Yes.

The Court: I don't suppose you heard that. Read it, Mrs. Bergen.

(Read by the reporter.)

Mr. Rudner: Your Honor rules against me?

The Court: Yes.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 407] MOTION FOR NONSUIT

Mr. Rudner: Now, my motion is for a non-suit on behalf of the defendant against the plaintiff and I urge these grounds: Plaintiff charges us with negligence in connection with there being an excessive amount of dust from two various chemicals in the plant of defendant company, particularized in respect to the sodium phosphate dust and the soda ash dust. Having in mind the fact the plaintiff himself is unable to produce any employee in the plant of this company or anyone else, and having in mind the fact the doctors who testified for the plaintiff have been unable to present a single instance of a long injury——

The Court: You are not seriously arguing or asking me to listen to an argument, Mr. Rudner, that I should nonsuit the case because someone else has not been injured in the same plant?

Mr. Rudner: Why, if your Honor please, knowledge——

The Court: Will you show me a case that would justify——

Mr. Rudner: I am going to read you right now from the Eighth Circuit in 73 Federal, E. I. Dupont de Nemours vs. [fol. 408] —. I just found this case the other day.

The Court: Get it, don't read it to me. I don't like to have cases read to me.

Mr. Rudner: May I read a statement from a further case?

The Court: No, you may produce any authorities that you wish me to look at but you may not read me any case. I find after I have read what counsel have stated to me that very often it is decided just the opposite.

Mr. Rudner: I may say this too while we are waiting: there is no proof in this case, having in mind the phosphate department independent of the silicate department, that this man was exposed to any dust of the soda ash or phosphate dust to bring about any injury. Assuming we have the recurring element of negligence as charged, there is no proof in this case that within the statutory period, having regard to the last date of employment and having regard to the date this man left the plant, that within the statutory period this man was subjected to any dust emissions from soda ash or phosphate of soda; that is, eliminating for the moment, the element of the silicate department and bringing him into the phosphate department, I say that he has not brought himself within the [fol. 409] statute of limitations, even with respect to the phosphate department.

The Court: Isn't is a fact that his last exposure there was within the statute?

Mr. Rudner: You mean taking the very last date of employment?

The Court: Yes.

Mr. Rudner: Well, now, he was employed, according to his testimony, until November, 1933; suit started October, 1935. So I say there is no proof of exposure up to the last time of his employment.

The Court: What is that citation?

Mr. Rudner: 73 Federal 26.

The Court: What part of this case do you think has anything to do with it?

Mr. Rudner: It is on page 31, righthand column.

The Court: The question of notice it was in that case.

Mr. Rudner: That's right.

The Court: Is that what you are arguing here?

Mr. Rudner: My argument comes in connection with [fol. 410] that part on page 31 where the court said this:

"It must be remembered that we are not dealing here with a product which is utterly unfit for the purpose for which it was intended or which was dangerous under all circumstances.

The Court: There is a vast litigation in dust cases. There are many reported cases on it. Have you any case where it is permissible to nonsuit because no other employee was injured? That is what I understand you are asking.

Mr. Rudner: In all those cases, sir, there was testimony of other employees who were subjected under the same circumstances and developed the same sort of illness. That was in the radium case, that was in the silicosis cases and that was——

The Court: Well, are you saying, advancing that in order for any employee to recover for injury from dust or injury from occupational diseases that there has to be evidence of more than one employee?

Mr. Rudner: Yes, sir.

The Court: Well, I would like some cases for that because a verdict of $25,000 was recovered on a manganese [fol. 411] case in a Circuit Court and upheld by the Court of Appeals, wasn't it?

Mr. Rudner: Only one person?

The Court: Yes.

Mr. Rudner: No other person had been injured?

The Court: Are you familiar with that case in the Court of Appeals?

Mr. Rudner: No, I am not familiar with that case. Maybe the question wasn't raised. To my knowledge, that certain things under certain circumstances would have certain effects is an essential element and ingredient in the matter of negligence. You cannot charge a man with negligence——

The Court: I would like a case involving some kind of industrial poisoning which advances the proposition.

Mr. Rudner: No, sir, all the dust cases, in all the dust cases I have read there have been witnesses produced who were working under the same conditions, suffered the same injuries. Not only do we not have any other case in this particular plant but the plaintiff, through all its depositions, has been unable to present a single instance, and I submit, [fol. 412] sir, that is entirely conclusive. I go further, your Honor please, and say this: the proof being to the effect that there are varying causes for a lung condition, particularly with regard to a lung abscess, there is no proof, at least substantial proof, that the negligence as charged was the proximate cause of the injuries of which the plaintiff now complains, and this is a very significant feature, your Honor please, that all the witnesses for the plaintiff, Dr. Gluckman, whom I know and highly regard, testified, as I understand it, that if this irritating substance brought about a lung condition of which this man now complains, it must have had a similar irritating, some irritating effect in the mouth and in the nostrils and in the other organs leading from the nostrils and mouth to the lungs. In this case we do not have any proof, any suggestion of proof of injury to the respiratory organs leading to the lungs. I say that is dispositive of the fact that this man could not have sustained his injury in a manner of which he now complains. Now, the cases also, the United States Supreme Court cases and the cases in this circuit, are that where anyone of several [fol. 413] factors may have been the causative factor in bringing about a certain injury, the fact that there are several indicates that the plaintiff has not established his case sufficiently to let him go to the jury on the issue of whether the negligence as charged did cause his injury. Now, the rule in the Federal Court is not the scintilla rule, plaintiff must produce substantial evidence that what he complains of as having happened did in fact happen. We cannot speculate as to the possibilities, and I can do nothing better except read to your Honor a statement of the United States Supreme Court——

The Court: I have read it many times.

Mr. Rudner:— vs. Pacific Railway Company——

The Court: I have read it many times.

Mr. Rudner: I know your Honor has.

The Court: Please don't cite a lot of general obvious propositions of law. I don't think at this stage of my judicial life I need them.

Mr. Rudner: I go further and say, if your Honor please, that on our defense of assumption of risk this plaintiff [fol. 414] should be non-suited. We all know that every employee assume a certain necessary risk in connection with his employment. If the condition of this plant was, as plaintiff says it was, if it kept continuously as he says, assuming his story to be true——

The Court: Have you any cases of industrial poisoning where it was held that a non-suit on assumption of risk should be granted?

Mr. Rudner: Does your Honor suggest that it is a matter of defense and a directed verdict? Well, I put it in the class of statute of limitations which can be moved—no, I think I know what your Honor is having in mind, but I submit that it still can be submitted by way of application for non-suit, particularly when plaintiff's own story shows that there is a positive case of assumption of risk, and I submit, sir, the case is barred by the statute of limitations, having regard to the fact that there is no positive proof in this case that this man was subjected to inhalation of any of these dusts during the statutory period, that he is barred by the statute of limitations.

The Court: Motion denied.

[fol. 415] Mr. Rudner: Just one other fact. I don't know whether your Honor remembers this factor, to me it was very decisive: Dr. Gettler testified that these samples were presented to him the early part of October, 1935. Suit was started October 1, 1935, and Dr. Gettler rendered no report until May of this year. That goes, to me, to the substance of plaintiff's case, and it was started last October. Plaintiff had no report from any source as to what caused this injury. The element of irritating effect of these dusts did not develop; they had no information about them until May this year.

The Court: Who didn't?

Mr. Rudner: Plaintiff's witness, Dr. Gettler, says he didn't report.

The Court: What has that to do with it?

Mr. Rudner: When the suit was started it was started on an element of chance, not on any substantial basis at the time.

The Court: That is a novel argument.

Mr. Rudner: Well, it goes to the allowance of the amendment.

The Court: Motion denied. You may have an exception.

[fol. 416] Defendant's counsel prays an exception to the refusal of the court to strike the testimony, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to grant a non-suit, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: Now, it is five minutes after three, your Honor. May I suggest this: there was a call left for me this morning, an appointment arranged to be in Newark at four o'clock. May we quit about four o'clock today?

The Court: I don't know, I don't propose to take up my whole time—I am thinking of sitting at night. Proceed, please.

Mr. Rudner: We will go ahead as far as we can this afternoon.

(Proceedings resumed in the presence of the jury.)

Mr. Rudner: I am going to call a witness out of turn who is here from Syracuse and just happened to be in town this afternoon.

[fol. 417] RALPH W. CHAFFE, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Doctor, where do you live, sir?
A. Syracuse, New York.
Q. And you are a practicing physician of the State of New York?
A. Yes.
Q. And of what medical college are you a graduate?
A. Hahneman Medical College and Hospital, Philadelphia.
Q. What year?
A. 1896.
Q. After graduating from the Hahneman Medical College did you serve an interneship?
A. I did.
Q. Where?
A. At hospital connected with the college.
Q. And after finishing there where did you go?
A. I went directly to Syracuse then.

Q. And did you start in the general practice of law at Syracuse?

A. General practice of medicine.

Q. I mean medicine. Oh, excuse me. You have practiced medicine ever since?

A. Yes, sir.

[fol. 418] Q. Are you connected with any factory in Syracuse?

A. Solvay Process Company.

Q. And how long have you been connected with that company?

A. 35 years.

Q. And in what capacity, Doctor?

A. As plant physician.

Q. Now, the Solvay Process Company, what does that manufacture?

A. Manufactures alkalis. The main products are carbonate and bicarbonate and caustic soda.

Q. Does it manufacture soda ash?

A. Yes.

Q. How long has it manufactured soda ash?

A. Well, that was what the plant was started for originally in 1882.

Q. Before your time?

A. Yes, long before my time.

Q. And what else does it manufacture of a caustic nature?

A. Well, it manufactures caustic soda.

Q. What other kinds of soda?

A. Bicarbonate.

Q. Now, are the caustic soda department and the soda [fol. 419] ash department all together?

A. No, they are separate.

Q. In connection with your work as a physician are you also a surgeon for the Solvay Process?

A. Yes.

Q. Are you in charge of the whole plant?

A. Yes.

Q. You are the chief physician in charge?

A. Yes.

Q. And as such physician have you become familiar with the products manufactured by the Solvay Process Company?

A. I have.

Q. And how have you become familiar with the products manufactured by the Solvay Process Company?

A. Well, through contact with the men, inspection of the plant.

Q. Have you gone through the plant?

A. Yes.

Q. Inspected the various plants?

A. Many times.

Q. Examined the men?

A. Yes.

Q. Do you have a system of examining your employees there?

[fol. 420] A. A yearly examination and pre-employment examination.

Q. And how long has that system been in vogue?

A. The pre-employment?

Q. The examination of your men, physical examination?

A. Well, that has always been in force.

Mr. Turtur: Your Honor please, I don't want to object. What has this to do—what do we care what the system up in the Solvay Manufacturing Company is?

The Court: What are you trying to do, qualify this doctor?

Mr. Rudner: I am going to show, sir, in the light of my argument, in effect, that this man, having checked all these employees for all these years, has never come across a case of injury to the respiratory organs when men worked with soda ash and these caustic dusts. I submit, sir, I am saying this very sincerely, your Honor, I think it is the crux of this case.

The Court: Well, have you any authority to support that evidence? I suppose you have none. From the beginning, Mr. Rudner—I don't want to seem captious with [fol. 421] counsel, but I think every one in this court room is agreed that this is the most tryingly tried case.

Mr. Rudner: It is trying on us. We have all worked hard, I know Mr. Turtur has and I have, in developing the facts.

The Court: Have you some authorities that you can show that caustic soda has not injured other people or that dust has not brought about silicosis, any other cases—have you?

Mr. Rudner: To me, sir——

The Court: I am sorry, Mr. Rudner, I have got to rely on other than counsel's opinion. That is my duty. I must rely on it. Now you have a very serious question of evidence here. Have you attempted to look it up or do you want me to try to look that up too?

Mr. Rudner: All right, your Honor please, if the plaintiff could have proved——

The Court: Can you hear what I say, Mr. Rudner? I am of the impression that you are not hearing what I say.

Mr. Rudner: No, I am hearing but I am trying to answer what your Honor just asked me. I say this, that there are cases allowing this evidence and if your Honor will allow [fol. 422] me to develop the theory I will tell you why I say so. If the plaintiff——

The Court: Unfortunately, I have to rule at once on an objection. You have given me no trial brief, I have extracted a memorandum out of your associate after some difficulty. Have you any brief on this at all?

Mr. Rudner: I will give you a brief, a whole trial brief. I didn't think your Honor wanted it.

The Court: Does it meet this point?

Mr. Rudner: Here is a brief on every case I presented. I didn't think your Honor wanted it.

The Court: Does it meet this point?

Mr. Rudner: I think the Eighth Circuit, yes, sir, allows that evidence.

The Court: Is that the case you rely on?

Mr. Rudner: If your Honor will allow me to state upon what theory it is admissible, based upon cases, not my imagination, I will tell your Honor. I say this: the cases hold that the plaintiff could have offered witnesses to show that under the same circumstances employees working at a particular place suffered the same injuries, that [fol. 423] would have been proper evidence. That has been held in various cases, the old Massachusetts case, it arose from that.

The Court: What old Massachusetts case?

Mr. Rudner: I remember that from the old law school, Standard Gas, to the effect that employees subjected to the inhalation of gas from a pipe that broke in the street, that these persons were affected the same way, testimony is admissible by the other persons who were similarly affected to show that they were similarly affected, and show it as a basis for negligence. Why can't we take the contrary of that proposition and show that other people working under the same circumstances have never been injured when nobody did -now anything about it? That goes to knowledge.

The Court: Because I think that the converse is not the law. Now, maybe I am wrong about it and I would like to have some cases.

Mr. Rudner: I will have to get your Honor cases. May we go ahead with this,—Dr. Chaffe being here, and present you with cases later? It strikes me it is relevant under the Eighth Circuit case.

[fol. 424] The Court: It may be relevant on the question of knowledge of a particular plant, that no one else had got a case too, if plaintiff's case of negligence was based on notice, then it might be relevant.

Mr. Rudner: But if we take the testimony of Dr. Gettler, that an insignificant amount of this dust can cause all this irritation, I am going to let this doctor testify to what his experience has been and what his observation has been. I am not going to ask him to testify specifically I am going to ask him to testify from experience.

Mr. Turtur: Dr. Gettler didn't say that an insignificant amount could cause this irritation, he said one speck——

The Court: Please don't go—go on.

Mr. Turtur: What does your Honor rule?

The Court: Just for the convenience of this doctor we will take the testimony. You may make a motion to strike.

Mr. Turtur: Your Honor then reserves the right to move to strike?

Q. In connection with your examinations, Doctor, have you come in personal contact with the employees of these caustic soda departments?

A. Yes.

[fol. 425] Q. Actually making the examination?

A. Yes, I do.

Mr. Turtur: Your Honor please, I beg your pardon, I am sorry to object but I must again object on the ground, your Honor, that he is talking about a factory that is located up there in Syracuse, New York. The doctor has already stated——

The Court: I think we understood what he was talking about. Go on, please.

Q. That has been over the period of time that you were chief physician of the Solvay Process?

A. Yes.

Q. Now, in addition to your duties as being physician, Doctor, do you in other ways come in contact with the ailments and sicknesses of the men who work in your plant?

Mr. Turtur: I object, your Honor.

A. Yes.

Q. In what way?

The Court: Go ahead.

Q. In what way, Doctor?

A. There is a mutual benefit society composed of the employees and they are entitled to medical services, I take care of them in that way.

[fol. 426] Q. So that whether a man became sick or injured at your plant or whether he became sick or injured outside the plant, the fact of such sickness or injury would come directly to your attention?

A. It would.

Q. Now, coming, Doctor, to the department where you manufacture soda ash, do you have a separate department for that?

A. Yes, sir.

Q. How many employees are employed there?

A. There are between two and three hundred daily.

Q. At one time?

A. At one times, yes.

Q. Over three shifts?

A. Over three shifts.

Q. That would be about one hundred in each shift, is that it?

A. Yes, it would between one hundred and one hundred twenty-five; I couldn't give you exact figures.

Q. And these men are actually engaged in the manufacture of soda ash?

A. Soda ash, yes.

Q. What else do they do in the soda ash department?

A. Besides the manufacture, they pack and ship the soda ash.

[fol. 427] Q. Now, the caustic department, you are talking about the caustic soda?

A. That is a separate department, separate manufacture.

Q. Separate department. And how many employees do they have there?

A. Well, I would say—this would be just an offhand guess—two hundred, two hundred and fifty.

Q. Over one shift or three shifts?

A. Well, they work in three shifts.

Q. Now, during the course of a day's operation would there be dust around the plant?

A. Yes.

Q. Would there be enough dust to cover a man's clothing and shoes during the course of the day?

A. They all have dust on their clothing.

Q. And how long is each operation, one day eight hours?

A. They work eight hour shifts.

Q. Eight hours a shift and are there particles of dust flying in the air?

A. Yes.

Q. And are those particles of dust flying in the vicinity of the men who work there?

A. Oh, yes, they are in contact with it all the time.

Q. Is that in the soda ash department?

[fol. 428] A. In the soda ash department.

Q. And in the caustic soda department?

A. There are some particles, very fine particles of caustic there; the men call them mosquitoes on account of the biting when they light on the skin, but there is none of that in the carbonate of soda or the soda ash department.

Q. In the soda ash department you have dust?

A. Yes.

Q. And during the course of the day that gets on the men's clothing?

A. Yes.

Q. During your experience, Doctor, at this Solvay Process for 35 years have you ever found a case yourself of any employee having suffered an injury to the respiratory organs by the inhalation of dust?

Mr. Turtur: I object to it.

The Court: You may answer.

A. No.

Q. Has any such case been reported to you by an employee?

A. No.

Q. So far as you know have any of those men in the employ of this company over a period of 35 years ever suffered from any condition of the lungs attributable to [fol. 429] the inhalation of these dusts about which I have spoken?

A. No.

The Court: Are you familiar with the properties of soda ash?

The Witness: Yes, I come in contact with it in my contact with these men.

The Court: Did you hear the testimony of Dr. Gettler?

The Witness: No, I didn't, I didn't.

The Court: Well, he testified that this soda ash was a caustic and caused an irritation when brought in contact with the proteins of the tissue.

The Witness: Soda ash is not a caustic, it is carbonate of soda. The caustic soda or sodium hydroxid is a caustic, but carbonate of soda or soda ash is not a caustic.

The Court: Do you mean that Dr. Gettler doesn't know what he is talking about?

The Witness: No, no.

Mr. Rudner: I think Dr. Gettler's statement was when it came in contact with moisture it hydrolyzes.

The Witness: Carnonate of soda is an alkaline the same as bicarbonate of soda. Car-onate of soda is more strongly [fol. 430] alkaline than the bicarbonate.

The Court: Soda ash is what we are talking about, is that not a caustic?

The Witness: No, it is an alkaline.

The Court: Your testimony is directly contrary to Dr. Gettler's then, isn't it?

The Witness: Well, I don't know what he testified to.

Mr. Turtur: Please, I cannot hear you, Doctor.

The Witness: I don't know what he testified to.

The Court: We certainly have got to determine right away whether caustic soda is or is not an alkali.

By Mr. Rudner:

Q. Well, the Solvay Process Company is the largest manufacturer of alkalis I think in the country, and that started from the fact that it manufactured mostly the two alkalis, carbonate and bicarbonate of soda, and then in another department they manufactured the caustic soda or sodium hydroxid, but, of course, we all know that bicarbonate of soda is an alkali and the carbonate of soda is a little more strongly alkaline than the bicarbonate.

[fol. 431] The Court: Well, what is soda ash?

The Witness: That is carbonate of soda.

The Court: And that is not an irritant, you say?

The Witness: It sometimes irritates. We have some irritations on the wrist but the men are handling that right along, hundreds of them every day.

The Court: What causes this irritation on the wrist?

The Witness: That comes in the summer when the men are warm and it gets in their sleeves, sometimes gets in their shoes, the dust, and causes an irritation there which I think is just the same as any other dust would cause an irritation there, a mechanical irritation.

The Court: You mean it is not a chemical irritation?

The Witness: We never have considered it a chemical irritation. We have had one case only of a dermatitis which was termed a dermatitis venenata by the skin specialist. He said in his opinion he thought that was due to the carbonate of soda. That is the only case I have ever heard of where there was external irritation, but the men [fol. 432] inhale the carbonate of soda dust there all the time, they cannot help it, in the manufacture of the soda ash and in the packing and shipping.

The Court: What I am trying to get at now is Dr. Gettler testified—and I understood that even Mr. Rudner agreed with his testimony—that it was not, as you say, an alkali but some form of acid which when applied to the tissues brought about an irritation.

The Witness: I never have heard such a theory advanced, I never have heard it called a caustic.

The Court: Where is that report of Dr. Gettler? Now, he says that this substance—and he said that they all acted in the same way, hydrolyze. Do you agree to that?

The Witness: The caustic soda does and the carbonate of soda. I have heard the chemists say that it does, I am not a chemist.

The Court: But not soda ash?

The Witness: Well, soda ash and the carbonate of soda are the same thing.

[fol. 433] The Court: All right. He says—here it is: "The soda ash, metasilicate, phosphate of soda, which is trisodium phosphate and silicate Grade F coming in contact with wet human tissue, hydrolizes and produces sodium hydroxid. This sodium hydroxid is very irritating and corrosive."

Now, if Dr. Gettler is wrong about that, we should of course know it. It seems to me an extraordinary statement for one of his ability to make, if inaccurate.

Mr. Rudner: Your Honor please, you have to consider Dr. Gettler's testimony in a very limited extent.

The Court: No, I am only asking the chemical effect of this soda ash. I am just asking whether it is corrosive at all, not whether it produces abscesses.

The Witness: I never have found it so.

The Court: What do your chemists say? Do they disagree with Gettler?

Mr. Rudner: I expect to have a chemist here from the same company next week. Dr. Chaffe just happened to be here in town.

The Court: I suggest we call a chemist who has nothing to do with one of these companies.

Mr. Rudner: Well, your Honor please, I cannot do any better than go to the company who manufactures this [fol. 434] thing.

The Court: Of course, they are interested, Mr. Rudner, in not having any litigation or suggestion of it. Now we have a preliminary chemical problem. I am loath to believe that Dr. Gettler, who is, as I said, quite distinguished, could have made a mistake about the effect of soda ash, or carbonate of soda, as you call it, I mean the chemical effect, not the medical effect, not the toxic effect, just the chemical effect. Now this doctor says that he is wrong.

The Witness: I have never seen in hundreds of men working there since I have been there any caustic effect from the carbonate of soda. I have seen plenty from the caustic soda, sodium hydroxid, which is strongly caustic and will destroy skin.

The Court: But you see here Dr. Gettler says that soda ash, that is, carbonate of soda, when wet becomes sodium hydroxid. Now chemically speaking, it is either so or it isn't so.

The Witness: I am not a chemist.

The Court: Now what is caustic soda made of?

The Witness: That is the sodium hydroxid.

The Court: Now is that product formed?

The Witness: I couldn't tell you.

The Court: Well, I am going to ask Dr. Wiene to come [fol. 435] here myself to enlighten the court and jury, because if Dr. Gettler is wrong about that, of course, there isn't any case. I mean I thought that was conceded.

Mr. Rudner: But your Honor please——

The Court: That he was chemically correct.

Mr. Rudner: He may be chemically correct under certain circumstances.

The Court: But this doctor says he is not even chemically correct.

Mr. Rudner: The doctor says he has never come across such a case.

The Court: No, your doctor has just testified that there is a difference between carbonate of soda and caustic soda, which I certainly, maybe stupidly, didn't comprehend, and it was mixed up in Dr. Gettler's testimony.

By Mr. Rudner:

Q. Is caustic soda something different from soda ash?

A. Yes, it is a very strong caustic, and that will destroy skin, destroy anything that it comes in contact with in any strength.

Q. Over your period of 35 years how many employes have you come in contact with?

Mr. Turtur: That is all subject to my objection, your [fol. 436] Honor please.

The Court: Certainly.

A. The number of employes there at that time has varied from 1800 to 3500 during that time.

The Court: Do you take any precautions at your plant to prevent a man inhaling this soda ash?

The Witness: Only in one place, in the store room there, when they emptied the store room. It is quite a bit larger than this room. The soda is packed in there temporarily, and is taken out by a conveyor. If that conveyor doesn't work properly, it banks just the same as a sand bank. There the men go along at the side, and with a long handled pole push it down. They may push ten or fifteen tons down on the floor; then there is a lot of dust rises from that, and in this place they use the respirator, but that is the only place.

The Court: Why do you use the respirator there if it is harmless dust?

The Witness: On account of the immense amount of dust that would come there, but in the ordinary manufacture of it, in the packing of it, where it is packed and shipped, they wear no respirators at all.

The Court: What harm could come to them from an enormous quantity of it.

[fol. 437] The Witness: Well, it might fill up, I suppose, fill up the nasal passages when they inhale it, if they inhale any quantity of it, until it causes them to sneeze.

The Court: What harm is there in that?

The Witness: None, not a bit.

The Court: Well, could this soda ash dust, Doctor, in your opinion, produce silicosis?

The Witness: No, there is no silica; that is not a silica preparation.

The Court: That is what I thought. Then what possible reason is there for protecting the men's lungs from quantities of it if it is harmless?

The Witness: Only on account of the irritation to the nasal passages in quantities.

The Court: I thought you said that it had no irritating effect?

The Witness: Well, in quantity it has where the air is filled with it, it irritates just the same as any dust, any form of dust, but that's all.

By Mr. Rudner:

Q. Under unusual conditions?

A. That is an unusual, very unusual condition there.

The Court: It says here in the dictionary, Doctor, that [fol. 438] sodium hydroxid—Century Dictionary, page 1760, "A white caustic solid NaOH used ni making soap." Is that what you use the sodium Hydroxid for?

The Witness: They don't use it themselves, but they ship it for that purpose.

The Court: What was the other, carbonate of soda?

The Witness: Sodium carbonate.

The Court: Yes, here it is, sodium carbonate, a compound of sodium Na_2CO_3, occurring in anhydrous form as a white powder in crystalline state as sal soda." Now the question would be whether the addition of H_2O to sodium carbonate would make it sodium hydroxid. You say it doesn't?

The Witness: I am not a chemist. I would rather not express an opinion on those chemical questions. I would get in over my head.

The Court: I would be inclined to think it wouldn't myself, from my slight knowledge of chemistry. I am going to have Dr. Wiener here on Tuesday.

By Mr. Rudner:

Q. Dr. Chaffe, have there been any men working in your soda ash department over a period of years?

A. Yes, many of them.

[fol. 439] Q. How long has any one or more men worked continuously in the soda ash?

A. We have two men there who were there when I went there.

Q. Thirty-five years ago?

A. Over thirty-five years.

Q. And still there?

A. And still there.

Q. Have you had any men who have worked for other periods of years?

A. Oh, yes, anywhere from five years up to that time. The labor turnover is very low in that department.

Q. Have you in your experience as a physician in this plant come in contact with cases of dust inhalations in other factories?

A. No, I have not.

Q. Have you ever heard outside of your plant of any respiratory injuries resulting from the inhalation of soda ash?

A. I have not.

Q. That's all.

Cross-examination by Mr. Turtur:

Q. Your practice, Doctor, has been limited to the plant wherein you are engaged, isn't it so?

A. No.

[fol. 440] Q. No?

A. No.

Q. Of course, you have been engaged up there in Syracuse since all the time that you testified?

A. Yes, sir.

Q. You have never been engaged in the Grasselli Chemical Company, have you?

A. No.

Q. You don't know under what circumstances they manufacture their soda ash there?

A. No.

Q. You don't. You have never seen their plant, have you?

A. No.

Q. You don't know whether it compares with the plant that you are in? You don't know whether there are any respirators used or whether there is any ventilating system, mechanically speaking, in the Grasselli Chemical Company, do you?

A. No.

Q. You don't know anything about the process of manufacture at the Grasselli Chemical Company, nor the conditions that the men work under?

A. No, not at all.

Mr. Turtur: Your Honor please, in view of that testimony, I respectfully submit that the testimony of this gentleman [fol. 441] be stricken as absolutely having no bearing in this case.

The Court: Well, I said Mr. Rudner would supply me with some authorities for his theory.

Mr. Turtur: You mean, your Honor, that I am to continue with my examination?

The Court: Of this doctor, yes.

Q. You don't mean to imply, Doctor, do you that the soda ash is the bicarbonate of soda that we take when we have a little bit too much to eat, do you?

A. No.

Q. You didn't mean to imply that?

A. No.

Q. The soda ash is a lot stronger than the bicarbonate that we take into our system for alkaline purposes?

A. It is more alkaline that bicarbonate.

Q. And it is a lot more irritating, isn't it, in this form when taken in great quantities, or breathed in in great quantities?

A. It might be.

Q. You are not a chemist, are you, Doctor?

A. No.

Q. You don't assume for a moment to disagree with Dr. Gettler, Professor Gettler, as to his testimony, if he says that this chemical is what it is, according to what Judge Clark read to you? You don't disagree with that, do you?

[fol. 442] A. No, I am only stating from my practical experience.

Q. And you are not a chemist?

A. I am not a chemist.

Q. And of course you have a great deal of regard for Dr. Gettler's opinion?

A. I don't think I have ever heard of Dr. Gettler.

Q. You have never heard of Dr. Gettler. You know that he is a toxicologist, do you?

A. I have heard so.

Q. You also have heard that he is professor at New York University in the field of chemistry, and has been so for over twenty years?

A. Yes.

Q. You also know that he has been professor of chemistry in Bellevue College?

Mr. Rudner: I object; entirely irrelevant, incompetent and immaterial for this witness to pass judgment on another witness. That is for the court and jury.

Mr. Turtur: I am asking if he knows.

Mr. Rudner: Makes no difference if he knows or not.

The Court: Sustained.

Q. In this department, Doctor, where the men use the [fol. 443] word "musquitoes," that is the place where this irritating substance is manufactured, isn't it?

A. That is where the caustic soda is manufactured.

Q. Of course you don't know where the caustic soda is in the Grasselli Chemical Company?

Mr. Rudner: They don't have caustic soda, no proof of their having caustic soda.

Mr. Turtur: Well, Mr. Rudner, you might be enlightened——

Mr. Rudner: I object. There is no testimony about caustic soda. They spoke about caustics, but they don't manufacture caustic soda.

Q. Doctor, do you know what washing powder is?

A. That is a compound.

Q. Of what?

A. They usually use the bicarbonate.

Q. Are you testifying, Doctor, from your own knowledge, or from what some chemist told you?

A. In regard to what question?

Q. In regard to my last question, sir. You didn't forget, did you?

(Question repeated by the reporter.)

A. That is a chemical proposition, and I don't know of my own knowledge.

Q. You don't know. And do you know whether that is an irritant or not, Doctor. That, of course, you are depend- [fol. 444] ing on somebody else's word?

A. Not of my own knowledge. I never have used it.

Q. You don't know. And the whole thing that you are testifying to here with reference to these chemicals you are depending a whole lot on what the chemists have told you at your plant; isn't that so?

Mr. Rudner: Your Honor, that isn't the case. The doctor testified from his experience in examining thousands of people over thirty-five years.

The Court: The doctor has frankly said he is not a chemist, and doesn't attempt to testify with respect to matters of a chemical nature.

Q. Therefore, Doctor, if I am correct, or rather, if I am incorrect, will you please so advise me? Are you testifying, Doctor, as to the chemical properties of these various substances from what chemists have told you.

A. No.

Q. You are not relying on what chemists have told you?

A. No.

Q. You know that of your own knowledge?

A. Do I know what of my own knowledge?

Q. The chemical substances?

A. Only from my contact with them. I am testifying as to their physical properties and the physical effects of those on the tissues as I have observed them.

[fol. 445] Q. Yes. What brings on dermatitis, Doctor?

A. Oh, that might come from hundreds of causes.

Q. Well, an irritant substance causes that, too, doesn't it?

A. Oh, yes.

Q. And an irritating chemical could cause that, too, couldn't it?

A. Yes.

Q. And, Doctor, along the same reason anything that is irritating to the skin is also irritating to the respiratory organs and lungs; isn't that so?

A. If inhaled.
Q. Isn't that so, Doctor?
A. Yes.
Q. Thank you very kindly. That's all.

Redirect examination.

By Mr. Rudner:

Q. And you have never heard of an injury to the respiratory organs arising from the inhalation of soda ash dust?

Mr. Turtur: I object to the question as being improper redirect. The doctor has already answered in response to a direct question.
The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.
William Clark. (Sealed.)

[fol. 446] A. I have not.
Q. That is all, Doctor.

Recross-examination.

By Mr. Turtur:

Q. Is the Solvay Process Company in any way connected with this Chemical Company?
A. I don't know. I never heard of this chemical company before.
Q. What is the parent company of your company?
A. The Solvay is a subsidiary of the Allied Chemical & Dye Corporation.
Q. And the parent company of that is what?
A. Of the Allied Chemical & Dye? That is composed of five different companies—Semet Solvay, Solvay Company, Solvay Process Company, the National Aniline, and the General Chemical.
Q. That's all, Doctor.

By Mr. Rudner:

Q. Doctor, does the Solvay Process manufacture soda ash in plants other than at Syracuse?
A. Yes, they have a plant at Detroit, Michigan, and at Baton Rouge, Louisiana.

Q. You have never had any duties to perform in connection with those factories?

Mr. Turtur: I object.

A. No.

[fol. 447] The Court: Do you know, Doctor, enough chemistry to know whether or not an alkali can be turned into an acid?

The Witness: I am not a chemist.

The Court: Well, do you know enough medicine to know whether an alkali can destroy tissue?

The Witness: Well, my only knowledge is from the experience I have had with them, where these products come in contact with the men.

The Court: In other words, the thing seems to be here that this sodium carbonate is an alkali. Now the question is whether adding water to it turns it into an acid. Have you any other questions?

Mr. Turtur: That's all I have—Just a moment, your Honor.

By Mr. Turtur:

Q. Doctor, did you ever perform an autopsy an anybody connected with the company?

A. No.

Q. You haven't?

A. No.

Q. Have you ever performed autopsies on lungs at all?

A. No.

Q. That is all.

[fol. 448] The Court: Any other doctors?

Mr. Rudner: Pardon?

The Court: No other doctors?

Mr. Rudner: That's all I have here this afternoon.

The Court: What is this witness?

Mr. Rudner: Superintendent or supervisor of the phosphate department, a chemist.

The Court: Chemist, put him on. I want to learn some chemistry.

CHARLES T. DAVIS, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Mr. Rudner: Your Honor may have same questions your Honor prefers to ask before I go ahead.

The Court: No, you go ahead; qualify him first.

Q. Mr. Davis, where do you live, sir?

A. Elizabeth, New Jersey.

Q. What is your profession or business?

A. I am a chemical engineer employed by the Grasselli Chemical Company.

Q. You are a graduate of some college or university?

A. Graduate of Harvard University.

Q. What degree?

A. B. S. Industrial Chemistry.

[fol. 449] Q. And what year?

A. 1924.

Q. After graduating from Harvard College where did you go, what did you do?

A. I was employed by the Grasselli Chemical Company.

Q. In what capacity?

A. As laboratory chemist, analyst.

Q. Where?

A. Grasselli, New Jersey, works.

Q. Where you are now employed?

A. Yes.

Q. What did you do in that laboratory?

A. Control analytical work for the operation of the plant.

Q. Did you examine chemicals?

A. I did.

Q. What chemicals did you examine?

A. All chemicals which are manufactured at that plant.

The Court: All right, Mr. Davis. Chemistry is an exact science, isn't it?

The Witness: It is.

The Court: Therefore, there cannot be any question of opinion, can there?

The Witness: On the highly theoretical side there is.

The Court: Well, in such problems that we wouldn't be [fol. 450] concerned with them. Now, as I understand it, it is agreed that soda ash is commonly known as sodium carbonate.

The Witness: That is correct, sir.

The Court: And is a compound of sodium with a chemical symbol Na_2CO_2.

The Witness: CO_3, Na_2CO_3.

The Court: You are right; that is my eyes, small type, CO_3.

The Witness: Correct.

The Court: What effect chemically has the addition of water to sodium carbonate chemically?

The Witness: When you add water to the sodium ash or sodium carbonate you merely produce a solution of sodium carbonate. There is no chemical effect in that it goes over to any other chemical. It still is sodium carbonate. If you take and evaporate that water you will have sodium carbonate left.

The Court: Well, then, Dr. Gettler's statement that the contact of sodium carbonate with water in the human tissue produces sodium hydroxid is, in your opinion, inaccurate?

The Witness: Absolutely. It does not produce sodium hydroxid. You get in solution an ionization effect in which [fol. 451] the sodium carbonate will break down into sodium ions. Of course, water also will break up into hydroxl ions. In caustic soda, or sodium hydroxid you get the same effect, only to a much greater extent.

The Court: I don't understand that. What is sodium hydroxid?

The Witness: Sodium hydroxid is NaOH, caustic soda.

The Court: Yes, that's right, according to my dictionary.

The Witness: How about Dr. Gettler, does he say that?

The Court: No, he doesn't give any chemical symbols.

The Witness: Of course, you can have that crystallizing with water in one form.

The Court: What is sodium hydroxid? I mean you have the chemical symbol, but what gives it its caustic or burning effect?

The Witness: Because it is a much stronger alkali than soda ash. Soda ash and caustic soda are both general alkalis.

The Court: Then I was wrong about that?

The Witness: Alkali is a general term.

The Court: They are both alkalis?

[fol. 452] The Witness: Yes, sir, sodium bicarbonate, soda ash and caustic soda are all alkalis. Lime is an alkali.

The Court: Well, if I wish to make the compound sodium hydroxid, how would I got about it?

The Witness: The Solvay Process Company, which I have some knowledge of, manufactures sodium hydroxid by reacting sodium carbonate or soda ash under pressure and temperature with lime, forming calcium carbonate and sodium hydroxid, and that is taken off as a weak solution and concentrated in an evaporator to the solid strength.

The Court: In other words, no amount of water poured on sodium carbonate would turn it into sodium hydroxid?

The Witness: No, sir, you couldn't convert sodium carbonate to sodium hydroxid by merely dissolving it in water.

The Court: In view of that, I am afraid we will have to have Dr. Gettler back on Tuesday. I will have an impartial chemist here and we will settle the chemistry of this matter, because I didn't understand——

Mr. Turtur: I will be very happy to bring him back at your Honor's direction.

[fol. 453] The Court: Of course, if this did not become a corrosive, and is not sodium hydroxid in the human body, then, of course, Mr. Matey's injury is in no way laid at the door of the soda ash.

Mr. Turtur: Except one thing, your Honor please, Dr. Gettler, your Honor stated this morning who he is comparable to for opinions.

The Court: I understand that, but it may possibly be that Dr. Gettler was not fully informed.

Mr. Rudner: I don't know of any greatness or halo on Dr. Gettler. He is employed mostly in homicide cases in New York.

Mr. Turtur: Not homicide cases. This morning he was making a test of a heart.

The Court: Tell him to be prepared to take soda ash and turn it into sodium hydroxid by combining it with water, or blood if he prefers. He says blood, too, but I don't think he meant to say blood in anything except a water sense.

Mr. Turtur: So that, your Honor, as I understand, you want Dr. Gettler here to come prepared to prove the things he states in that report; is that so?

The Court: I imagine it wouldn't be very complicated to make the test. He had better bring his apparatus with him.

[fol. 454] Mr. Turtur: In court here?

The Court: And I will have an impartial chemist to instruct us.

Mr. Rudner: When is this going to be done, your Honor?

The Court: Tuesday.

Mr. Rudner: Is your Honor not going to sit Monday?

The Court: I am sitting, but I have got motions.

Mr. Turtur: Supposing, your Honor, Professor Gettler is elsewhere Tuesday? I mean, in case he doesn't get here at 10:30, will it be all right at two o'clock in the afternoon?

The Court: It is a very serious part of your case. Chemistry is fortunately an exact science, and if he is wrong about it, exactly speaking, your client couldn't possibly have received his abscess in this way, because it depended upon Dr. Gettler's chemical analysis.

Mr. Turtur: I am so sold, your Honor please, on Dr. Gettler, that I am willing to stand or fall——

Mr. Rudner: Your Honor please, there are a lot of things I could say——

The Court: Well, I am not sold on anybody. I am just sold on the truth.

[fol. 455] Mr. Turtur: Well, I am sold on Dr. Gettler.

The Court: Could that be easily explained, the making of sodium hydroxid? Could a test to that effect be carried out?

The Witness: It would be quite difficult, sir, although you may take—no, you couldn't do it here, you couldn't do that here; no, it is quite an elaborate piece of apparatus.

The Court: You mean the addition of—what was it?

The Witness: You could take and make a solution of soda ash and add lime water to it, and precipitate your calcium carbonate and the solution you had left would be in great part a solution of caustic soda and some calcium carbonate.

The Court: What is Lime, Doctor?

The Witness: Lime is calcium carbonate, usually calcium hydroxid. Lime water is calcium hydroxid.

The Court: Well, why—this is maybe a very silly question—why does the addition of this calcium to sodium carbonate——

The Witness: Sodium carbonate, yes, sir.

The Court: Give us this NaOH?

The Witness: You take calcium hydroxid and sodium carbonate, or calcium in solution with the sodium carbon-

[fol. 456] ate will combine with the Ca_3 and form $CaCO_3$, which is really marble or limestone, and that precipitates out of the solution as a solid, leaving in solution the sodium and hydroxyl ions, forming sodium hydroxid, and then you have to concentrate that to get out the calcium carbonate which has been dissolved in the solution, and also get the full strength caustic solution.

Mr. Turtur: May I ask, your Honor, if it would be of any assistance to the court that any chemical evidence be given when Dr. Gettler is here, so that your Honor may interrogate Dr. Gettler, not only as to his report, but as to his knowledge?

The Court: I am not going to have any more chemical testimony of this kind. I just wanted to find out from Mr. Davis, who is a chemist, although maybe not quite impartial, as to whether there was some doubt. Now there is some doubt, very grave doubt, in my mind.

Mr. Turtur: That is what I thought. If I could be of any aid to the court and jury in getting down to the bottom of this thing, as long as Professor Gettler is coming Tuesday, he might be of some aid to the court and jury and counsel in finding out what these things are, because I must confess to the court I don't know.

[fol. 457] The Court: Well, I don't know, because as I say, I don't understand how silicate could ever become sodium hydroxid. I don't know any chemistry, but I think that would be obviously impossible, and Dr. Gettler includes that as one of the things that becomes sodium hydroxid.

Mr. Turtur: That is metasilicate. That is different from the other.

The Court: How could that become sodium hydroxid? There isn't any sodium in it.

Mr. Rudner: It is insoluble.

The Witness: Yes, metasilicate is sodium silicate $5H_2O$ crystal form.

The Court: Then it is somewhat the same, isn't it? Well, that's all I want to know technically.

Mr. Rudner: Now, if your Honor please——

The Court: We will adjourn now, gentlemen, until 10:30 on Tuesday. All of you bring your chemistry books.

(At this point an adjournment was taken to Tuesday, June 16, 1936, at 10:30 A. M.)

[fol. 457a] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 457-b] [Title omitted]

[fol. 458] Tuesday, June 16, 1936.
10:30 A. M.

Case continued.
Same appearances.

The Court: I have Dr. Wiener here, gentlemen, in this case. He is a very distinguished chemist, as you probably know. Do you want me to call him first?

Mr. Turtur: Whatever your Honor says. I am perfectly willing. May I in deference to the court and jury, your Honor please, if your Honor deems it necessary, ask that the testimony of Mr. Davis be read, so that Dr. Wiener might know, and so that Professor Gettler might know, as to what Mr. Davis said?

The Court: I think it would be very helpful. Will you step up, Dr. Gettler?

(Testimony of Mr. Davis read by the reporter.)

Mr. Rudner: I suppose the record should show, your Honor please, that Dr. Wiener is a witness called by your Honor.

Mr. Rudner: Since Mr. Davis' testimony has been read, your Honor, I think Dr. Gettler's testimony should be read to Dr. Wiener.

[fol. 458-a] Mr. Turtur: I have no objection to it.

(The reporter thereupon read directed portions of Dr. Gettler's testimony.)

William Wiener, Called by the Court, testified as follows:

By the Court:

Q. Now, Dr. Wiener, you, I think, have gathered from what you have heard read from both sides what the chemical problem is, haven't you?

A. I am not quite certain just what the question is, except as to the solution of the carbonate of soda.

Q. That is what we are trying to find out. What is the effect? I mean, of course, counsel can ask other questions if they don't feel I have covered the matter from their point of view. The problem, as I understand it, is—what is the effect of water, in your opinion, on this sodium carbonate?

A. Well, it simply dissolves. It acts as a solvent, and would not change it chemically at all, simply leaves it as sodium carbonate, dividing it into smaller and smaller particles, molecules of sodium carbonate. That is, if you have a glass and put a teaspoonfull of it in there, it would dissolve it, and then put it in a pail, it would still be in evidence, and if you put it into a barrel or hogshead, and increase [fol. 459] the quantity, and then evaporate it, and it came back again, you would come to the same original substance.

Q. You mean there is no chemical reaction in your judgment, between the sodium carbonate and the water?

A. No, because a chemical reaction means a chemical change, and the substance itself would have altered its nature and general character if there were a chemical change.

Q. Well, then, in your opinion, how would you go about bringing the chemical reaction from sodium carbonate, which is sodium hydroxid?

A. No.

Q. Maybe I put that wrong.

A. Sodium carbonate would have a symbol that is ordinarily given as Na_2CO_3, and if it had its water crystallization in crystal form $12H_2O$, the water of crystallization. It sometimes loses that water of crystallization, forms a powder, and then becomes with a greater or lesser quantity of molecular water parts——

Q. Then how would you form if you can, sodium hydroxid from sodium carbonate?

A. There would be several ways to proceed with that, by heating the substance, heating up to a very high temperature.

Q. Sodium carbonate?

[fol. 460] A. Sodium carbonate, driving off the carbonic acid. That would be the simplest way. That would leave the Na_2O, which is the sodium oxide, and then this sodium oxide having water added to it, would then be converted into sodium hydroxid.

Q. What do you call a high temperature?

A. Well, I should say a temperature of about five or six hundred degrees.

Q. In what other ways would it be?

A. You might treat it with lime.

Q. What would that do?

A. With lime water, or lime calcium oxide dissolved, and that would form then a calcium carbonate and sodium hydroxid in the solution. That would be another simple way of proceeding with it. Then, of course, that water could be drawn off that sodium hydroxid and evaporated, concentrated, I mean the water drawn off, and you get your sodium hydroxid.

The Court: That's all. I think I have covered what I want to know. If Dr. Gettler himself wants to ask a question——

Mr. Turtur: I would appreciate it immensely if you would let him do so.

The Court: Because after all, he is a chemist. You don't mind that, do you, Doctor?

The Witness: Not at all.

[fol. 461] (The following questions were propounded by Dr. Gettler:)

Q. What is an alkali?

A. An alkali is a substance which would show blue—turn red litmus paper blue. That is the simplest of the tests.

Q. What will it do with phenolphthalein?

A. It will turn that blue.

Q. It will turn phenolphthalein blue?

A. Well, under what conditions?

The Court: Doctor, just a second. Are you questioning Dr. Wiener's qualifications, because if you are I will produce any chemist you want. I mean if this is an examination of Dr. Wiener to see whether he knows any chemistry or not——

Dr. Gettler: I think, your Honor, we are dealing with the specific question, based upon Dr. Wiener's testimony, as to the relation of sodium——

The Court: If you dispute his qualifications, we will get another chemist. I mean I just asked Dr. Wiener, because he is the leading chemist in Newark.

Mr. Turtur: Well, your Honor instructed me to bring back Professor Gettler, ready to prove that in the mixture [fol. 462] of soda ash with water, it produces the hydrolysis. We have come prepared to show that, in accordance with your Honor's instructions.

Mr. Rudner: We haven't got to that. We are dealing with the question of Dr. Wiener's——

The Court: Let's not get quarreling.

Mr. Turtur: No, but I am merely bringing forth what occurred, please, the instruction to me and which we are ready to prove, chemically speaking.

The Court: Would you like the experiment conducted so Dr. Wiener can see it?

Dr. Gettler: Yes, but I would like to ask a few questions first.

The Court: As to his qualifications?

Dr. Gettler: Not as to his qualifications.

The Court: Was your question not a qualifying question?

Dr. Gettler: No, sir.

The Court: I beg your pardon. It is awfully hard for us laymen.

Dr. Gettler: I am only trying to get Dr. Wiener's answers before I do the experiment.

(Questions continued by Dr. Gettler.)

Q. What is the effect of alkalis on phenolphthalein?

[fol. 463] A. It would give a pinkish or reddish color.

Q. Pink or red color. What in alkaline solution changes phenolphthalein to pink or red?

A. The presence of the alkali itself. That is, it is an indicator of the alkaline presence.

Q. Isn't it a fact, a chemical fact, that the hydroxyl ions change, indicating as to the alkaline nature?

A. That may happen, too.

Q. Hydroxyl ions change phenolphthalein to red?

A. Yes.

Q. Hydrogen ion change the red color of phenolphthalein to colorless?

A. Yes.

Q. Does sodium carbonate, soda ash, turn phenolphthalein red?

A. I think it does.

Q. It does. Isn't that proof that sodium carbonate produces hydroxyl ions?

A. Well, I wouldn't say that, no.

Q. Well, what else changes phenolphthalein to a red color besides hydroxyl ions?

A. Well, the hydroxyl ions are a part of the chemical compound.

Q. I know that. My question is, what else besides hydroxyl ions change phenolphthalein to red color?

[fol. 464] A. There are a great many organic compounds. I cannot enumerate them at the present time.

Q. What part of the hydroxyl ions change phenolphthalein to a red?

A. Well, the hydroxyl part of it.

Q. The hydroxyl ion only?

A. Oh, it isn't a separate thing, as though it was an active separate agent, if that is what you wish to infer.

Q. I am trying to find out whether you know if there is any other group which will turn phenolphthalein red, besides the hydroxyl ion?

A. Yes, there are other substances.

Q. Will you please name them?

A. Well, any one of the carbonate groups, potassium carbonate, lithium carbonate.

Q. Do you mean to state that carbonate ions will turn phenolphthalein red?

A. Yes, I don't mean the ions themselves, but in combination they do.

Q. In combination with what?

A. With the alkali.

Q. Can you show the court any book, any statement, in all the literature on chemistry which states of any other substance except hydroxyl ions which turns phenolphthalein red?

Mr. Rudner: I object to that question.

[fol. 465] The Court: I am confused, Dr. Gettler. You stated that soda ash in contact with water became sodium hydroxid. Now I should think that was a very simple fact. I took it to be a fact when you stated it. I should think if we could take sodium carbonate and put it in water, and then if the chemical result was sodium hydroxid, you are right. If it isn't, you are wrong.

Dr. Gettler: Yes, your Honor, sodium hydroxid in the presence of water, in fact all salts and acids and alkalis in water, ionize, and the sodium hydroxid in water ionizes to sodium ions and hydroxyl ions.

The Court: Your testimony was, as I understood it, which was borne out by your letter, that it became sodium hydroxid, which is caustic soda. Now do you want to change that to say that it becomes hydroxyl ions?

Dr. Gettler: No, sir, I don't want to change it.

The Court: What is the fact, then?

Dr. Gettler: In water, sodium hydroxid is present in both forms, unionized and ionized, the more water, the more ionized.

Mr. Rudner: Your honor——

The Court: Just a minute.

[fol. 466] Mr. Rudner: I don't want to interfere with this conversation, but Dr. Gettler is now making statements of fact which he should give from the witness stand under oath.

The Court: He is under oath.

Mr. Rudner: He has been sworn. I suppose that is literally true. Go ahead.

The Court: Go ahead, Doctor.

Dr. Gettler: Sodium hydroxid in water is present in both forms, sodium hydroxid molecules and sodium hydroxid ions, that means present as sodium ions and hydroxyl ions. Now the more water you add, the more ionized form of sodium hydroxid is present, the less water more of the unionized form is present. No water at all, it is all sodium hydroxid molecules. If you dilute to infinite dilution—you don't have to go to infinite with sodium hydroxid, because it is very powerfully ionized, but in a very great deal, practically all of the sodium hydroxid is ionized. So when I say sodium hydroxid in water, I mean both forms of sodium hydroxid, the molecular form and the ionized form.

Mr. Rudner: Your Honor please, Dr. Wiener says that the chemical form is not changed.

The Court: Is Dr. Wiener wrong, and was the other [fol. 467] chemist wrong when they said that the way to change sodium carbonate into sodium hydroxid was either by lime or by heat? Was that wrong?

Dr. Gettler: No, your Honor, that is one method, that is one method in which they manufacture sodium hydroxid on a large scale, manufacture it in barrels in large quantities. The effect of water on sodium carbonate hydrolysis is a known fact in chemistry. There isn't one book or one piece of literature which states the contrary, that sodium carbonate does not hydrolize.

The Court: Does not hydrolize?

Dr. Gettler: There is no book, no literature on chemistry that states that sodium carbonate when coming in contact with water does not form sodium hydroxid, sodium ions and hydroxyl ions. They all state that. It is a known chemical fact that water does change and hydrolize sodium carbonate to an alkaline substance, and this alkaline substance is ionized sodium hydroxid.

The Court: But that is a little different from what you said the other day.

Dr. Gettler: No, sir.

The Court: And different from what you wrote, I think.

Dr. Gettler: No, sir, the other day I made just a short [fol. 468] statement that when sodium carbonate comes in contact with water it hydrolizes and forms sodium hydroxid.

The Court: Both chemists say that isn't so.

Dr. Gettler: I cannot help that, your Honor. I have a whole raft of literature here.

The Court: Let me read it.

Dr. Gettler: I am willing to take any books that Dr. Wiener presents and abide by it.

Mr. Rudner: Your Honor please, on the question of procedure, it now develops that Dr. Gettler is testifying as plaintiff's witness, and I presume the case is being reopened for the purpose of letting Dr. Gettler testify.

The Court: Don't add legal technicalities to the chemical ones.

Mr. Turtur: Mr. Rudner cannot suppose anything for me. This is per instruction of the court. That is what we are doing now.

The Court: I understand.

Mr. Rudner: We have to have orderly procedure here; there cannot be any question on it.

Mr. Turtur: The Judge is sole judge of that.

Mr. Rudner: Your Honor has ruled that as a question of [fol. 469] procedure the plaintiff's case is being opened?

The Court: What becomes, before I look at the books, Dr. Gettler, of the carbonate in sodium carbonate when this water is added?

Dr. Gettler: It forms carbonate ion CO_3 units with double negative charge of electricity.

The Court: Well, do I understand now that you say that these hydroxyl ions are the corrosive element in the body?

Dr. Gettler: Yes, your Honor. Alkalinity caustic effects are due to the OH ion of the caustic soda.

The Court: You mustn't use, if you don't mind, these general terms like caustic soda. Caustic soda is sodium hydroxid?

Dr. Gettler: Sodium hydroxid.

The Court: Which you now say is not formed—contrary to what you said before——

Dr. Gettler: No, sir, I do say it is formed, but it is formed in both the unionized state and the ionized state.

The Court: Well, what becomes of the carbonate?

Dr. Gettler: The carbonate ion remains also in solution as [fol. 470] the CO_3 unit. The carbonate ion if your Honor permits, I have made here a diagram of what happens.

The Court: Show that to Dr. Wiener. I am not enough of a chemist to know that. May I show that to Dr. Wiener?

Dr. Gettler: Yes, sir.

Mr. Turtur: Pardon me; do you read German, Dr. Wiener?

Mr. Rudner: I submit you cannot read any statements from any books in the record. The witness can refer to any books, he cannot read from any books.

Mr. Turtur: We will get to that in a few minutes in proper form. Dr. Wiener has put some question marks on his card, your Honor, that might be interesting.

(A short recess was here taken.)

The Clerk: Have counsel any objection to the jury looking at these charts. They have asked to see the charts.

Mr. Turtur: No objection on my part. Mr. Rudner, the jury has asked to look at these charts.

Mr. Rudner: No objection.

[fol. 471] Mr. Turtur: How many are there?

The Clerk: Three.

The Court: Go ahead, Doctor.

Mr. Turtur: Your Honor, so that you might be informed, the jurors have asked for the charts.

The Court: If they understand it, they are better men than I am; no doubt they are, yes. Go ahead, Doctor. Do you want to ask Dr. Wiener about these charts?

Dr. Gettler: No, I have nothing to ask about my charts.

The Court: Did you examine them, Dr. Wiener?

Dr. Gettler: I simply asked Dr. Wiener whether he could produce any literature or any books which state that there is any other substance except the hydroxyl ion which turns phenolphthalein red.

Mr. Rudner: Your Honor please, I think Dr. Gettler is now becoming argumentative.

The Court: No, no, you see I don't believe the problem is really as complicated as it has been made to appear. This sodium hydroxid is certainly a different chemical substance, Dr. Gettler, isn't it, from sodium carbonate?

Dr. Gettler: In the dry state, yes.

[fol. 472] The Court: It is a stronger substance, more caustic?

Dr. Gettler: In the dry state neither is caustic. They only become caustic when moisture, water meets them.

The Court: Well, do you say that sodium carbonate is as caustic when water is added to it?

Dr. Gettler: No, sir, sodium hydroxid is more caustic than sodium carbonate, simply because there are more hydroxyl ions present per unit volume when you dissolve sodium hydroxid than when you dissolve sodium carbonate.

The Court: Well, it might be due to your feeling that we wouldn't understand it, but your testimony was a little misleading because you talked both in the testimony and this letter about sodium hydroxid, and that isn't really what you mean. You mean, as I now understand it, hydroxyl ions.

Dr. Gettler: The hydroxyl ions are the ions which actually do the corrosion and change the indicators, but when sodium carbonate is brought in contact with water, you do get sodium hydroxid in both forms, you see, the unionized form, which is sodium hydroxid units, and the ionized form sodium and hydroxyl ions.

The Court: You failed to state that. You made the pre- [fol. 473] vious statement that you got sodium hydroxid, when as a matter of fact, you got these sodium hydroxyl ions.

Dr. Gettler: Well, I suppose it is such a general thing in chemistry that sodium hydroxid in water ionizes that I neglected to state it.

Mr. Rudner: Dr. Gettler went beyond that. He said it was a highly caustic substance resulting from the combination of water and soda ash, this caustic substance was sodium hydroxid. There was no question about that.

The Court: You see you agreed, didn't you Doctor, that sodium carbonate was soda ash when put in contact with water, although the alkali was not corrosive. Is that correct?

Dr. Gettler: No, I maintain that sodium carbonate is irritating and corrosive when in contact with water.

The Court: Well, then, put it this way: It is not as irritating as sodium hydroxid in contact with water.

Dr. Gettler: No, it is not as irritating. Sodium hydroxid is very much more powerful because of the greater concentration.

The Court: Well, that is what was certainly not clear to me, or I think to the jury, or clear from your letter, because [fol. 474] we understood that you said, that you meant to say rather, that this sodium carbonate became a different chemical substance with a different formula, which was very much more corrosive. Now that isn't quite so?

Dr. Gettler: Yes, sir, it is so. That is just what I wanted to say. Sodium carbonate when——

The Court: That has a certain symbol?

Dr. Gettler: Na_2CO_3.

The Court: All right. Sodium hydroxid has another symbol?

Dr. Gettler: $NaOH$.

The Court: Due to the absence of the carbon. That is a fact; isn't it?

Dr. Gettler: Yes, your Honor.

The Court: Now, in between, that is, I understand it, you have a third substance, is that it?

Dr. Gettler: In between?

The Court: Yes, these hydroxyl ions.

Dr. Gettler: Well, the sodium hydroxid in water ionizes.

The Court: Doesn't anything in water ionize?

Dr. Gettler: Yes, sir.

The Court: I mean sugar, or——.

Dr. Gettler: No, organic substances do not ionize. In- [fol. 475] organic substances ionize, and organic salts ionize.

The Court: All inorganic substances ionize, is that it?

Dr. Gettler: Yes, sir, excepting we might say the oxids; the oxids do not ionize, but all salts, all acids and all alkalis ionize.

The Court: Which is an electrical phenomena.

Dr. Gettler: Oh, yes.

The Court: Well, how exactly do you figure out that it is electrical, which is not a chemical reaction, but an electrical reaction, which adds to the irritating effect of sodium carbonate?

Dr. Gettler: The hydroxyl ion of sodium hydroxid is the particular substance which produces the irritating effect.

By the Court:

Q. All right. Now, can you help us on that, Dr. Wiener?

A. Well, it might be interesting to note, first of all, that if you take your sodium carbonate, of which the symbol would be—that is, the one as given you just now, Na_2CO_3, you would have about 46 parts of sodium by weight, and about 50 or 60 parts of CO_3, as was given here. The sodium hydroxid would have 23 parts of sodium as against 17 parts [fol. 476] of hydroxyl atoms; in other words, the sodium hydroxid would at all times be the more powerful irritant and alkaline substance, and this one would be just of a minor nature, minor irritating character, alkaline, but in the proportion, if we took the atomic weights, Na OH would be about 40, that is 23—16, and one for the hydrogen, and 46—12 and 48 for the oxygen in the sodium carbonate, the Na_2CO_3, making a total in the first instance of 40 as against 106, accounting, in my judgment, for the lesser irritating effect of the sodium carbonate, that is, taking it salt for salt.

Q. Well, what is a hydroxyl ion?

A. Just that OH part that comes from that, and in the one case it would be for the Na OH as shown here, instead of taking it as the Doctor has taken it; he has taken a single atom and said Na OH; we would, if we were treating the ionization, we would take two of the Na OH, and say that two Na and two OH would be formed according to this, instead of single, making of course, the higher hydroxyl power, whereas with the carbonate, even as shown by his diagram, he shows CO_3 and the Na_2CO_3, and then with the ionization shows the CO_3 and the HO H, which breaks up afterwards into a single OH as against the double in the hydroxid. I really don't know what the purpose of this whole thing is except it explains a chemical theory that is extremely interesting, and I don't know, but at times even doubts have been [fol. 477] expressed upon that, but I wouldn't cast any doubts on this, because it is fairly well acknowledged—but exactly what else you are after, except that the Na OH is the more destructive combination, much more destructive than Na_2CO_3, I don't know what else.

The Court: Do you say, Dr. Gettler, if you put water in sodium hydroxid, then are the hydroxyl ions more numerous? Is that it, or what?

Dr. Gettler: Yes, sodium hydroxid in the dry state—the ions are not free. They are united in molecular form. You add a trace of water there is a little breaking up, ionization, and the more water you add, the more it ionizes; the more hydroxyl ions you get the more water you add.

The Witness: To a certain limit.

The Court: Well, certainly we have gotten a different picture than we had, perhaps stupidly, because we are not chemists, from your testimony the other day. We have not got the sodium hydroxid at all, which we thought you were testifying to.

Dr. Gettler: Oh, yes, your Honor, I still maintain we have sodium hydroxid.

The Court: Well, we can't have. I mean that is obvious [fol. 478] that that is a misstatement, I mean not sufficiently conclusive statement. You have hydroxyl ion, which is a very different thing from the ~~chemical~~ sodium hydroxid. There is a difference between the two.

Dr. Gettler: There is a difference between the two, but the active principle of sodium hydroxid is the hydroxyl ion.

The Court: Maybe that is true. I don't dispute that, but it is not as active, that is the point; is it?

Dr. Gettler: It is not as active as what?

The Court: As the alkali.

Dr. Gettler: As what?

The Court: As sodium hydroxid.

Dr. Gettler: No, I stated all the time that sodium hydroxid is much more alkaline than sodium carbonate, because when you take sodium hydroxid it is all sodium hydroxid——

The Court: Yes, but then it is not accurate to say, as you did say in this letter, "This sodium hydroxid is very irritating." You should have said it is the hydroxyl ions made by combination of water and sodium carbonate which are irritating.

Dr. Gettler: Yes. Well, that is what I said before.

[fol. 479] The Court: I don't mean that you are being consciously inaccurate.

Dr. Gettler: You see, from a chemical standpoint, it is so obvious that all these substances ionize, that I simply said sodium hydroxid is formed, knowing that in water it ionizes to produce sodium ions and hydroxyl ions.

The Court: Well, in your opinion, is hydroxyl ion more irritating than the dry substance?

Dr. Gettler: Oh, yes.

The Court: Why is that?

Dr. Gettler: Because the dry substance is not ionized.

The Court: I mean, in other words, supposing I put soda ash on my skin, drying it, that is not irritating at all.

Dr. Gettler: Your Honor, you can never dry your skin thoroughly—impossible, there is always some moisture. You dry it as much as you want, and there is always moisture coming up. It is impossible to get the skin 100 per cent dry. If the skin was 100 per cent dry, if I took some skin, cut it off and dried it in a drying oven and got it 100 per cent dry and put on that some absolutely dry soda ash, there would be no effect.

[fol. 480] The Court: Then if you put on some absolutely dry sodium hydroxid——

Dr. Gettler: There would be no effect.

The Court: Now, take some other substances that ionize, would they be irritating?

Dr. Gettler: Salt.

The Court: What salt, what chemical?

Dr. Gettler: Well, some dry substance, some dry powders. Of course, not from the chemical side, but from the physical side some dry powders are slightly irritating, such as coal dust; these men that work in mines, they keep inhaling coal dust. Now coal dust is chemically a neutral substance, but then coal dust irritates simply because it is a foreign body in the lungs, the same as these silicosis cases, they inhale silica. Now silica SIO_2, is almost neutral. These substances that irritate, they irritate by virtue of being a foreign body in the system.

The Court: Sodium bicarbonate, of course that is an alkali too, isn't it?

Dr. Gettler: Sodium bicarbonate is a very mild alkali, just slightly.

The Court: Well, then, as I understand it, when we take bicarbonate of soda after we have been up too late, or something, in that, of course, as you say, the hydroxyl [fol. 481] ions form, don't they?

Dr. Gettler: Yes, there are some hydroxyl ions form from bicarbonate of soda, but at the same time, as my chart shows, there is also carbonic acid formed, and the carbonic acid partially neutralizes the hydroxyl ions, and that is why bicarbonate is very slightly alkaline. Now I have had a very interesting occurrence in my laboratory.

As you said, that bicarbonate that is taken by very many people for stomach conditions,—Dr. Charles Norris, Chief Medical Examiner of New York, died about a year ago—he was very much interested in one of my cases——

Mr. Rudner: Your Honor please, I object.

Mr. Turtur: This goes to your Honor's question. If Mr. Rudner does not want to allow it, I will ask him the very question——

Mr. Rudner: I will give you a chance. I object to any statement of Dr. Gettler referring to work done by other persons. He can refer to the man's name, not beyond that.

Mr. Turtur: But he is going to tell just exactly what Dr. Gettler's experience was of his own work.

The Court: Go ahead.

Defendant's counsel prays an exception, which is hereby [fol. 482] allowed and sealed accordingly.

William Clark. (Sealed.)

Dr. Gettler: Four children died in one of the hospitals of New York by being given by mistake sodium carbonate, and I analyzed them. The symptoms were the same symptoms which we have mentioned here. We do not need to go over it again. They died and I analyzed them, and I found the sodium carbonate which they had been given, what happened in the wards somebody threw washing soda, which is sodium carbonate, into the large container containing milk sugar, and the nurse not knowing it, thought it was milk sugar, and she made up the feeding bottles. Well, Dr. Norris didn't believe at that time that that small amount would have that effect, so he was going to prove it on himself. So he came up to my laboratory and he took some sodium carbonate, put it in the water and dissolved it and drank it, and he was a mighty strong man, a football player in his days, he got terrifically sick and vomited, so that shows the difference between bicarbonate and soda ash, sodium carbonate.

The Court: Well, your theory is, as I now understand it, it is certainly different from what we had the other day, that any alkali mingled with water, forms hydroxyl [fol. 483] ions, and that the number of those ions depends upon the kind of alkali, that the smallest number is sodium bicarbonate, the next largest number is sodium carbonate, and the last and largest number sodium hydroxid?

Dr. Gettler: That is correct.

By the Court:

Q. Do you agree with that, Dr. Wiener?
A. Well, I think that there would be some difference in the character and quality, the power of the hydroxyl ion, and the source whence it came.
Q. How could we determine that?

Mr. Turtur: We will prove it right there.
The Court: Now, please, counsel.

Q. How could we determine that?
A. I don't know exactly how that can be determined.

The Court: Do you know a way, Doctor?
Dr. Gettler: To prove the alkalinity?
Dr. Wiener: No, the difference——
The Court: The difference in hydroxyl ions.
Dr. Wiener: The source of hydroxyl ions——
Dr. Gettler: You can prove the difference in the strength of the hydroxyl ions very easily by indicators, such as phenolphthalein.
The Court: That is the purpose of those questions?
[fol. 484] Dr. Gettler: Yes.
The Court: You agree to that?
Dr. Wiener: Yes, that is true.
The Court: Then let us try the three substances and have medical testimony with respect to other facts.
Mr. Rudner: I have a couple of chemists who would like to watch these tests.
Mr. Turtur: They may be able to learn something.
Mr. Rudner: If your Honor please, if there will be any questions I would like these chemists to know step by step what products are being used.
The Court: You are going to have an opportunity. Of course, Dr. Wiener is impartial. Your chemists can hear this testimony, or can have it read back to them.
Dr. Gettler: I have brought along here four substances in their original containers.
Mr. Rudner: Let's have the experts agree, sir, what is supposed to be in those containers, are in fact in them, so that there will be no question of the original materials used.
The Court: All right. Who is your chief chemist?

Mr. Rudner: Mr. Davis and Mr. Heard.

[fol. 485] The Court: You treat us just as if we were a class, Dr. Gettler, only a very stupid one.

A Juror: Which we are.

Mr. Davis: Mr. Davis tastes sodium bicarb and the carbonate.

The Court: Please don't taste the hydroxid, from what we have heard about it.

Mr. Davis: A small amount of that won't hurt you.

(Mr. Davis tasted a very small amount.)

The Court: Now, what is this, sodium chlorid? Is that for your experiment?

Dr. Gettler: Yes, this is ordinary table salt, sodium chlorid. I have marked the test tube Na CO, that is sodium chlorid.

Mr. Turtur: May I have some water, Mr. Simon, please?

Dr. Gettler: The second test tube I marked bicarbonate. I will take a sample of the bicarbonate, and the third one I am going to put some of the sodium carbonate—soda ash in. The test tube is labeled sodium carbonate.

Mr. Turtur: Would you mind marking it soda ash, too, Doctor? If you will, I will appreciate it.

[fol. 486] Dr. Gettler: I will mark it ash, and the last one I have marked—this one—sodium hydroxid NA OH. I will just take one little pellet. Now I will dissolve this.

(Test tubes shaken.)

Dr. Gettler: Now, very alkaline substances, those which ionize and give a lot of hydroxyl ions, as Dr. Wiener agreed, turn phenolphthalein a red.

The Court: Can you say it over again, Doctor?

Mr. Turtur: NACL first, Doctor?

Dr. Gettler: Yes.

Mr. Turtur: Then sodium carbonate?

Dr. Gettler: This is sodium chlorid, table salt. The second one is bicarbonate. The third one is soda ash, and the last one sodium hydroxid. We add about three drops of phenolphthalein to each. Notice the phenolphthalein is colorless.

Mr. Turtur: Three drops, Doctor?

Dr. Gettler: Three or four.

Mr. Turtur: Is that enough?

Dr. Gettler: No, a little more.

Mr. Turtur: Is that enough?

Dr. Gettler: Yes, that's all right, that's enough. Now you notice the original table salt is colorless, the bicarbonate is colorless, almost colorless, showing that the alkalinity is very, very little. The sodium carbonate, soda ash, is [fol. 487] as red almost as the sodium hydroxid.

Mr. Turtur: The NAC then, the bicarbonate, and the next is what, Professor, soda ash?

Dr. Gettler: Yes, that is soda ash. It is marked, and that is sodium hydroxid.

A Juror: Pour a little more phenolphthalein in there.

The Court: Can you seal them, Doctor, can you seal those tubes?

Dr. Gettler: I have nothing to seal them with. One of them is going to change color on standing.

Mr. Turtur: Which is that, Professor?

Dr. Gettler: Sodium hydroxid will change color, because it is more corrosive, and it acts on the phenolphthalein itself and decomposes it.

The Court: What color will it change to?

Dr. Gettler: Colorless, but then if we add more phenolphthalein it will get red again.

The Court: Will you, Dr. Wiener, ask Dr. Gettler any questions you would like to ask him as a result of the experiment?

Dr. Wiener: When sodium chlorid is dissolved in water, you say that ionizes?

Dr. Gettler: It does.

[fol. 488] Dr. Wiener: And forms the hydroxyl ion?

Dr. Gettler: It does not.

Dr. Wiener: Then it doesn't ionize in the sense that these other substances do?

Dr. Gettler: It ionizes in the same sense that sodium carbonate hydrolyzes. That hydrolysis of sodium carbonate produces the sodium hydroxid. Sodium hydroxid which is then produced ionizes, but the conversion of sodium carbonate to sodium hydroxyd is due to hydrolysis, which means a double decomposition reaction with water.

Dr. Wiener: So that it is only carbonates and hydroxids that form these hydroxyl ions?

Dr. Gettler: No, it is not. All salts of strong bases and weak acids hydrolyze and give an alkaline reaction, all salts of strong bases and weak acids. Say for instance, sodium sulphide hydrolyzes and is very alkaline. Sodium sulphite hydrolyzes and is very alkaline, all salts that have a strong base and a weak acid. You see, sodium carbonate, carbonic acid, is a very weak acid; sodium is a very strong basic substance, so it hydrolyzes.

The Court: Dr. Gettler, is there any way of testing other than by color, which is of course some way, but those two colors are not terribly far apart—of testing the amount of hydroxyl ions other than by the test you gave, which [fol. 489] does to some extent?

Dr. Gettler: Yes, your Honor, there is a way, but it is a very, very complicated electrical set up, by actually determining the number of hydrogen ions and hydroxyl ions.

The Court: In the various substances?

Dr. Gettler: Yes.

The Court: Has that ever been done?

Dr. Gettler: Oh, yes, that has been done very often.

The Court: What does it show? Has it been written up?

Dr. Gettler: Oh, yes, that has all been written up.

The Court: Well, in other words, could you show us any authority which would say sodium carbonate when mingled with water shows so many hydroxyl ions, and sodium hydroxyl when mingled with water shows so many more, which I understand is the fact?

Dr. Gettler: Yes, you can find that in the literature, but of course, that depends upon the dilution. You must compare the substances.

The Court: Well, under the same dilutions.

Dr. Gettler: Under the same dilutions, oh, yes, that has [fol. 490] been done, and we can find that in literature.

The Court: What is the proportion, do you know? Is there anything in any of these books?

Dr. Gettler: I doubt it, because matter of that kind will be found in physical chemistries. These books I produce there are unorganic chemistries.

The Court: Can you say offhand what the proportion is? Is it 1 to 5, 1 to 10, or——

Dr. Gettler: Well, I wouldn't want to say, give an exact figure.

The Court: Do you want to ask Dr. Wiener any questions? You ought to call your chemist now while Dr. Gettler is here.

By Mr. Turtur:

Q. Dr. Wiener, may I ask you, please, what does the color indicate in these test tubes? For instance, in NaOH, what does that indicate to you, sir?

A. That is a stronger alkaline substance.

Q. Yes, and in the soda ash tube?

A. That is less alkaline than the first that you showed me.

Q. And alkaline is the irritating or corrosive substance, isn't that so?

A. Yes.

Q. What was your answer?

[fol. 491] A. I said yes.

Q. Thank you, sir. You note in the test tube marked bicarb, you notice there that that is very slightly pinkish.

A. Yes.

Q. What does that indicate?

A. That it is only slightly alkaline.

Q. That is what Professor Gettler just told the court about bicarbonate, isn't that so?

A. Yes.

Q. When it is taken late at night, and what did this indicate to you, Doctor, as to the salt?

A. Practically neutral.

The Court: Doctor, will you come up here and sit as my accessory?

Mr. Rudner: I may want to ask the Doctor a question.

Mr. Turtur: Was it your Honor's directions—I don't know what your Honor stated—that these tubes be sealed?

The Court: Yes, be marked exhibits. Would you call your chemists?

Mr. Rudner: What I should like to have done, sir, I would like to have Mr. Davis and Mr. Heard make the same tests that Dr. Gettler just made.

The Court: Why certainly, of course.

[fol. 492] Mr. Rudner: I might say Mr. Heard is the chief plant chemist of Solvay Process, a works which makes sodium hydroxid and soda ash.

The Court: Better swear him.

Mr. Rudner: May I suggest this, that in view of the fact that plaintiff's case has been opened and Dr. Gettler testified, I may have some motions to make, but I suppose I had better make them later on.

The Court: Yes.

Mr. Rudner: That right is reserved?

The Court: Yes. Swear this witness, qualify him for the record.

Joseph R. Heard, Called and sworn for the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

The Court: Just qualify him.

Q. Mr. Heard, where do you live, sir?

A. Syracuse, New York.

Q. And what company are you connected with?

A. Solvay Process Company.

Q. What is your education?

A. I graduated from Tuffts College in 1922, with the degree of Bachelor of Science & Chemistry.

Q. And after graduating from Tuffts College in 1922, [fol. 493] what did you do?

A. I secured a position as a research chemist with the Atlas Powder Company.

Mr. Turtur: Will you be so kind, Mr. Heard, as to speak a little louder? I would appreciate it.

A. I secured a position with the Atlas Powder Company as research chemist, and I was located at their research laboratories at Tomaqua, Pennsylvania.

Q. Where was that?

A. It is near Pottsville, Pennsylvania, and Reading.

Q. While with the Atlas Powder Company what did you do?

A. Why, I carried on a miscellaneous kind of work, many investigations—there was no set kind of work.

Q. In the chemical laboratories?

A. Some of it was analytical work, some of it was helping the men in the plant, on problems in the plant.

Q. How long were you with the Atlas Powder Company?

A. About a year and a half.

Q. And then where did you go?

A. I went to the Solvay Process Company in Syracuse.

Q. In what capacity?

A. I first went to them as a research chemist, and I was attached to the research laboratory.

Q. What products does the Solvay Process Company [fol. 494] manufacture since you have been there?

A. Soda ash, caustic soda, liquid chlorine.

Q. When you say caustic soda, what do you mean, sodium hydroxid?

A. Yes, that is the common commercial name for sodium hydroxid.

Q. I see. What else?

A. Sodium nitrite, ammonium chlorid, ammonium bicarbonate.

Q. Now, since you have been with the Solvay Process Company, what have been your duties there from the time you started until the present time?

A. I first worked as a research chemist for several years. Then I worked for a period of years as a technical service man. That was giving technical assistance to our various customers, particularly those who might not have a chemical laboratory and needed chemical assistance, or even where they did have chemical laboratories, but wanted our opinion on our products where we might have more real data than they would, because we specialized in it.

Q. How long did you do that work?

A. About four or five years. I don't recall the exact dates. Then I went on to plant work, working out in our plant in the various sections of the plant. I was still working as a member of the chemical division, then I was transferred to the plant organization for about a year as a tech- [fol. 495] nical assistant in the part of the plant where we make soda ash. Then I was transferred back to the laboratory and made plant chemist to take charge of the plant laboratory in which we take care of our control work in the plant, as well as investigational work in connection with plant problems, and I still have that position.

Q. Now you are the plant chemist of the Solvay Process Company at Syracuse?

A. Yes.

Q. How many employes at that plant?

A. Can I just give round figures?

Q. Rough figures.

A. Seventeen hundred or eighteen hundred, I would say.

Q. And you have men working under you in the laboratory?

A. Yes, sir.

Q. About how many?

A. Twenty men working directly under me all the time. Occasionally, when I need more help——

Q. Now does your present work and your work in the past bring you in direct contact with the various products manufactured by the Solvay Process Company at Syracuse?

A. Yes, sir.

Q. That includes soda ash, sodium hydroxid?

[fol. 496] A. Yes, sir.

The Court: Any further qualifications?

Mr. Turtur: I didn't object to the gentleman's qualifications.

The Court: I think the witness is pretty well qualified.

Mr. Turtur: Yes, I think he is, too.

The Court: All right, Mr. Heard, you may step down please.

(Mr. Davis thereupon performed the following experiment):

Mr. Davis: This will be merely to show the various effects, and if Dr. Gettler will permit I will use his chemicals, or my own.

Mr. Turtur: Mr. Rudner, is this going to show whether or not this product is alkaline or not?

Mr. Rudner: I will let Mr. Davis say.

Mr. Turtur: I am asking you a question, so we may know what he is doing for the record.

Mr. Rudner: Can you do the same experiment, Mr. Davis?

Mr. Davis: Somewhat the same, but a little different to show the effect.

Mr. Rudner: Will you explain it?

Mr. Davis: I will as I go, yes, sir.

[fol. 497] Mr. Rudner: You put a small amount of soda ash in that first beaker, and also in the second.

Mr. Turtur: That is sodium bicarbonate, not sodium ash.

Mr. Davis: Sorry, I got the wrong one.

Mr. Turtur: Is this it, Mr. Davis, sodium carbonate?

Mr. Davis: Correct. You are a better chemist than I am. Then we put sodium hydroxid in this one, adding to them distilled water.

Mr. Turtur: I think, your Honor please, if we used just the regular water that Professor Gettler used, rather than distilled water.

The Court: Now, don't be captious, please.

Mr. Turtur: Well, I don't know whether it makes any difference, your Honor please.

The Court: It won't, I can tell you that.

Mr. Davis: I can say that it doesn't make any difference. I think Dr. Gettler will bear me out on that, that it doesn't make any difference.

The Court: Is that that same——

Mr. Davis: Same indicator, phenolphthalein.

The Court: You haven't got the salt, though. You just have the other three.

Mr. Davis: No, sir, I haven't. I am not interested in that, sir.

[fol. 498] The Court: Dr. Wiener is going to put both sodium hydroxid and soda ash on his hand to show the effect on his skin. Will you give him some?

Mr. Davis: This is a ten per cent normally neutral.

The Court: Wait a second.

Mr. Davis: Barium chlorid solution. With this you notice the solution is geting cloudy, and the pink color is disappearing.

Mr. Rudner: That is in the what?

Mr. Davis: In soda ash. Now you can put that in caustic, and regardless of how much barium chlorid I should add to this caustic, I will not destroy the color. I will merely dilute it.

The Court: Stir it up. What's the other one, the bicarbonate?

Mr. Davis: No, sir. Now this is still soda ash in this middle beaker, and it should act the same as this first one, if I put in barium chlorid as it is, but should I take a little of this caustic and put in this middle beaker, now I have a small amount of caustic soda in that middle beaker, and I cannot destroy the color. I am diluting it, but I cannot destroy it. That is a qualitative test for the presence of free caustic. At any time we have soda ash, barium [fol. 499] chlorid will precipitate the carbonate as barium carbonate, and throws the soda ash completely out of the picture, so that you have no color, but when you have the least amount of caustic present you cannot do that. In other words, I can take this first beaker here, or put a little of this caustic soda in, just a trifle, I can add more barium chlorid, and I will merely dilute the color, I won't destroy it, showing that I have caustic soda present there. Now in a straight soda ash solution you can destroy that color, but when you have caustic there you cannot destroy it, showing the distinguishing difference between caustic soda and soda ash. Now there is just one other——

[fol. 500] Dr. Gettler: May I try something before you go any further?

Mr. Davis: Yes, sir.

Mr. Rudner: Better explain as you go along, Dr. Gettler.

Dr. Gettler: I am simply going to add a little more soda ash into the beaker—I don't know, I never did this before.

Mr. Rudner: Into the what, Dr. Gettler?

Dr. Gettler: Into the beaker. That does not lose its color.

Mr. Davis: That is a mixture of soda ash and caustic he has there.

Dr. Gettler: I simply added some more soda ash. This is distilled water and you notice that by adding soda ash the color does weaken. I will talk about the rest later on.

Mr. Davis: It does weaken or dilute the color but the color is still there.

The Court: Dr. Wiener says he is going to put a little sodium hydroxide on one hand and a little soda ash on the other and rub it in slightly, thereby making a guinea pig of himself.

Mr. Davis: I even, sir, went as far as to test the caustic——

[fol. 501] The Court: Dr. Wiener says the tongue is tough; sometimes when it is used it is, I know that. Will you hand him, Dr. Gettler, one of your bottles so we are sure we have the right one.

Mr. Davis: There is one other thing I would like to show——

The Court: Dr. Wiener wants to do it right away, he says.

Mr. Davis: The caustic, unfortunately, is in pellet form.

The Court: You had it in powdered form?

Dr. Gettler: No, sir.

The Court: Dr. Wiener says he will break it up.

Mr. Davis: He will have a tough job.

Mr. Turtur: Will you use Dr. Gettler's letter there?

The Court: Don't use the letter, I will give you a pad. That is the sodium hydroxid, he is rubbing it on the skin of his hand; that is on the left hand. Now, on the other hand put the sodium carbonate.

Dr. Wiener (exhibiting to the jury): It is beginning to burn.

[fol. 502] The Court: That is sodium hydroxid. You will have to compensate Dr. Wiener if he becomes ill. Dr. Wiener is going to leave them for a few moments.

Mr. Rudner: Does that burn?

Dr. Wiener: No.

Mr. Turtur: Dr Wiener's statement about the right hand I think ought to be in evidence as to the effect.

The Court: On the right hand he has sodium carbonate, on the right hand. Have you anything else, Mr. Davis?

Mr. Davis: Yes, sir, there is one other thing I would like to show. Taking another small portion of sodium carbonate or soda ash, placing it in the beaker, adding to that tap water or distilled water—this happens to be distilled water because I got it in the laboratory—I am placing some phenolphthalein in that. We now have a soda ash solution. In our breath we have carbon dioxid as a gas given off by combustion of our food stuffs the same as you have in your gasoline motor or in a fire. Now, by blowing my breath in a soda ash solution it will lose color. I got a little more soda ash in there than I wanted to do, but it [fol. 503] will go in time. You notice it is getting lighter now. Now it is practically completely gone. That same thing can be accomplished through caustic soda but you have to blow a little longer because that has a higher alkalinity and that is converting by your breath soda ash into bicarbonate. That is all, Mr. Rudner.

The Court: Do you want to ask him any questions, Dr. Gettler?

Dr. Gettler: No. I would like to explain his results, that's about all.

The Court: Well, you can interpret them.

Mr. Davis: Can I carry on one other affair while we are waiting for Dr. Gettler?

The Court: Certainly, Mr. Davis.

Mr. Davis: This is plain distilled water. I will put a little phenolphthalein in it and to show the alkalinity of some of the materials which we take in our body, here is every-day milk of magnesia which we frequently have used in our homes. That is the alkalinity of your milk of magnesia and I am sure there is nothing——

Mr. Rudner: Better explain the color. Mr. Davis.

Mr. Davis: The color is the same type of color that you [fol. 504] get in either soda ash or caustic, it is from the same effect, an alkaline effect, from milk of magnesia, and this, of course, is given to adults and minors, very young children and in varying quantities.

Mr. Rudner: How much did you put in that glass?

The Court: What is that?

Mr. Davis: Milk of magnesia. I used about a teaspoonful in this glass. There is a little distilled water in there with it.

The Court: Go ahead, Dr. Gettler.

Dr. Gettler: On the first experiment—I have got to bring in a little more chemistry that is not in evidence. I have written the reaction of sodium carbonate and water in the simplest possible form, bringing in ionization and hydrolysis at the same time. In other words, instead of writing three or four equations I have simply written one and I have here sodium carbonate plus water gives sodium hydroxid plus carbonic acid. Now, as I testified to before, that reaction is a reversible reaction, the more water you add the more the change to the right. As you keep on adding more water there [fol. 505] is more reaction to the right; there is more hydrolysis. As you remove water the reaction goes to the left, back to sodium carbonate. This is a reversible reaction, it can go either way. Now, we can make that reaction go — the left or to the right, not only by adding water or removing water but leaving the water in there and removing one of the other products. If I remove from the sphere of action sodium carbonate, the reaction will go this way; if I remove from the sphere of action CO_2 or sodium hydroxid, the reaction will go this way. What Mr. Davis has done is add to this reaction barium chlorid, a more or less neutral substance—it is not exactly neutral but we will give him the benefit of the doubt and call it neutral. The barium ionized, as you notice, when he added it he gets an insoluble substance, barium carbonate. You notice it got cloudy. Barium carbonate is precipitated and taken out of the sphere of action, hence the action keeps going to the left and the hydrolysis is reversed, and that is why the red color disappears.

The Court: Then why doesn't — disappear in the sodium hydroxid?

Dr. Gettler: Barium carbonate is very, very insoluble, [fol. 506] one of the most insoluble substances we have, and that is why it precipitates and drops down to the bottom of the beaker. Barium hydroxid is fairly soluble in the amounts he has added; no barium hydroxid precipitates and therefore the reaction is not forced to the left and remains pink.

The Court: Well, the fact is, isn't it, Mr. Gettler, as I now understand it—I think we do understand it—that the number of hydroxyl ions in sodium carbonate is very much less than it is in sodium hydroxid.

Dr. Gettler: I said that.

The Court: Yes, that is what we did not understand the other day, which I think we now understand. Now, for instance, Dr. Wiener's hand shows where he rubbed the sodium hydroxid, a small scarring or burn; where he rubbed the sodium carbonate there is no indication on the skin at all and I think if any member of the jury would like to try it on themselves——

Dr. Gettler: May I say a word?

The Court: Yes, certainly.

Dr. Gettler: If Dr. Wiener would take a solution of sodium carbonate, especially a warm solution, say 50 or 60 [fol. 507] degrees centigrade, and put his hands in there and wash his handkerchief and take it out, he will find that his fingertips are all corroded; which any woman that washes in washing soda finds out. Of course, with sodium hydroxid you get it so rapidly; with sodium carbonate you don't get it so rapidly.

The Court: In other words, it is a question of degree and I would like to know if we could have submitted the proportion of hydroxyl ions numerically, namely, one in five or one in ten, as I suggested or whatever the fact is.

Dr. Gettler: I can look that up in the physical literature or Dr. Wiener can look it up.

The Court: Can you, Doctor?

Dr. Wiener: Yes.

The Court: Because we then have proportionate strength. Now, what the medical effect of the proportionate strength is, — of course, another question.

Dr. Gettler: Now, the second reaction, let's see, what was the second reaction?

Mr. Davis: Take soda ash to which some caustic was added; is that the one you have reference to?

Dr. Gettler: Oh, yes. Well, the second test Mr. Davis [fol. 508] made, the explanation is the same. You see, in the second test he added sodium carbonate and sodium hydroxid. Well, the sodium hydroxid is not affected by the barium chlorid because it does not precipitate the barium hydroxid. Now, on the third test, milk of magnesia, I certainly admit it is alkaline enough to change phenolphthalein to red. If powdered milk of magnesia, which is magnesium hydroxid, if powdered milk of magnesia comes into contact with organs it also irritates the organs and tissues and lungs. The reason children and babies can take milk of magnesia is that in babies and children they give a teaspoonful or an ordinary spoonful. Now, we must remember that the stomach of all people is acidic; it contains hydrochloric acid, 2/10 to 4/10 per cent hydrochloric acid. Now, you take a good dose of milk of magnesia, the hydrochloric acid neutralizes a great part of that alkalinity. If I would add stomach contents to this it would become colorless. One must not lose sight of the fact that the alkalinity, if it were introduced into the stomach, must be enormously greater because first you have to get rid of the hydrochloric [fol. 509] acid there present.

Mr. Rudner: How about in the mouth, Doctor, with respect to milk of magnesia? Are the same chemical qualities present in the mouth as in the stomach?

Dr. Gettler: Powdered milk of magnesia?

Mr. Rudner: Not powdered, liquid.

Mr. Turtur: The Doctor is trying to explain the difference.

Mr. Rudner: Now, that was liquid magnesium here.

Dr. Gettler: If you could keep a fairly strong solution of milk of magnesia in your mouth for several hours you would get an irritating effect.

Mr. Rudner: For several hours?

Dr. Gettler: Yes.

Mr. Rudner: How about if you just gargle with it or use it as a mouth rinse?

Dr. Gettler: As I said—well, no use testifying to what I said the last time—the mouth and the tongue are continually secreting saliva and this saliva is continually washing out the mouth; we are continually swallowing saliva and sometimes we expectorate and that continually washes. So [fol. 510] it is very difficult to keep anything on the tongue for any long period of time, but if there were no secretion and you kept it there for hours you would get an irritating effect even from milk of magnesia.

The Court: Anything else from your chemist?

Mr. Rudner: I don't know where we stand. I don't know whether it is plaintiff's case or defendant's case, these tests that were made. Have you any further tests, Mr. Davis?

Mr. Davis: No further tests.

Mr. Rudner: Now I would like to ask Dr. Gettler a couple of questions. Please take the stand.

Alexander O. Gettler, recalled, for further cross-examination, testified as follows:

Further cross-examination.

By Mr. Rudner:

Q. The distinction today which you make is this, that instead of the chemicals going through a process of hydrolysis they go through a process of ionization?

A. No, I didn't say that.

Q. Pardon me?

[fol. 511] A. I didn't say that.

Q. What do you say?

A. I said that—we have to talk of each substance separately, sodium hydroxid ionizes, sodium hydroxid never hydrolyzes, it is already in a hydrolyzed condition.

Q. I am talking about soda ash.

A. Sodium carbonate first ionizes and after it is ionized it hydrolyzes.

Q. In your testimony—have you finished, excuse me. In your testimony the other day you never mentioned the word "ionization" at all, did you?

A. I answered that remark today several times.

Q. What is that?

A. I answered that question several times today; I did not because I thought in the chemical sense it is a foregone conclusion, it is general knowledge that all the substances ionize, so I didn't say the ionization part. The hydrolysis part was the important part because ionization alone will not produce sodium hydroxid from sodium carbonate. Ionization will not produce it. It is the hydrolysis which produces it and that is why I put special attention on the hydrolysis.

Q. You know very well, Doctor, from your experience [fol. 512] in testifying that testimony is supposed to be accurate and exact and you know, of course, that the mere statement of the hydrolysis without mentioning ionization before the change of your story was very important.

Mr. Turtur: I object.

A. Oh, I don't think so.

Mr. Turtur: I object to this question.

Q. You don't think so?

A. I don't think so.

Q. Well, is it now important or isn't it?

A. We talk in chemistry about hydrolysis all the time. We lecture the students on hydrolysis and we hardly mention ionization at that point because it is understood that these substances ionize.

Q. Well, you cannot speak of hydrolysis with respect to soda ash unless you speak of ionization at the same time?

A. Yes.

Q. Then if you tell students that it goes through a process of hydrolysis without telling them about ionization you are not teaching them exact chemistry.

A. They get ionization discussion several months before they come to hydrolyysis. They must know ionization perfectly before we teach them hydrolysis.

Q. Why didn't you testify the other day about ioniza- [fol. 513] tion?

A. I just answered that a minute ago, because I took for granted that the gentlemen know in chemistry that what we know as ionization is there.

Q. You took it for granted we would all know about the ionization?

A. I didn't take it for granted you all knew, I simply didn't mention it for that reason. I will admit I didn't mention the ionization part of it.

Q. Didn't you assume that most of us don't know anything about chemistry?

A. Yes, I assumed that.

Q. Why didn't you say something about ionization?

A. Because to my mind ionization is always present; the moment water is added ionization is present.

Q. Dr. Gettler, you never presented your theory with respect to this case until May 5, 1936, and did you know that the suit in this case had started October 1, 1935?

Mr. Turtur: I object to the question because I had information way back in October when the suit was started but it wasn't put down in due form that I gave to your Honor until May.

The Court: I sustain the objection.

Q. Dr. Gettler, you testified, as I recall, that carbonic [fol. 514] acid is present in both soda ash and in bicarbonate of soda, is that correct?

A. I didn't testify to that.

Q. What did you testify, what makes bicarbonate of soda less alkaline than soda ash?

A. Bicarbonate of soda is less alkaline because for every molecule of sodium hydroxid or for every ion, hydroxyl ion, in sodium bicarbonate there is produced twice the equivalent of carbonic acid whereas in soda ash the equivalent is only one for one.

Q. Well, then, is carbonic acid present in both?

A. (No answer.)

Q. That is my question, is it present in both, bicarbonate of soda and soda ash?

A. In soda ash there is present a very, very faint trace of carbonic acid; in bicarbonate of soda there is present more.

Q. Oh, I see. It is in fact present then in both of these chemicals?

A. Yes, it is present in both of these chemicals in solution.

Q. There is a difference in degree but it is present in both cases?

A. In solution.

Q. And why do you say that carbonic acid does neutralize [fol. 515] the bicarbonate of soda and does not neutralize soda ash?

A. I didn't say that, I said that in soda ash you have produced one equivalent of base to one equivalent of say carbonic acid, whereas in bicarbonate of soda you have one equivalent of sodium hydroxid or hydroxyl ion to two of the acidic substance. So there is more acidic substance in bicarbonate to neutralize the alkalinity.

Q. Is carbonic acid also present in sodium hydroxid?

A. Not in pure sodium hydroxid. If you allow sodium hydroxid to stand in an open dish it will absorb carbon dioxid from the atmosphere and form sodium bicarbonate.

Q. Aside from that is it present?

A. No, it is not present in pure sodium hydroxid.

Q. That is all.

Redirect examination.

By Mr. Turtur:

Q. Doctor, may I ask you this question please: What are the chemical or physical properties contained in the skin and in the lung tissue?

Mr. Rudner: Objected to on the ground that Dr. Gettler is not a physician.

Mr. Turtur: Your Honor please, I was going to bring [fol. 516] this out once and for all that Professor Gettler teaches physicians and teaches physicians on arriving at various diagnoses.

The Court: I don't see how we add to that——

Mr. Turtur: For this reason——

The Court: Wait a minute. I don't see how we add anything. Dr. Gettler said the presence of these hydroxyl ions is irritating to the chemistry of the skin. Is that disputed? Now, Dr. Wiener here, I will have him show the jury the difference in corrosive effect of the soda ash and the sodium hydroxid. I note where the sodium hydroxid is rubbed there is already a swelling and a little scar; on the other hand there is nothing.

Mr. Turtur: Except this, your Honor please, that as has already been explained to the court and to the jury that some people are more susceptible to an irritation than others and further that if Dr. Wiener were to taste this very substance that I tasted yesterday, the soda ash solution, he would spit it out so fast that he would have to run to the sink.

Mr. Rudner: I object.

[fol. 517] The Court: That is most obnoxious. Strike it out.

Mr. Turtur: May I say this, that it does make a difference in the manner in which you are subjected to the inhalation of these fumes.

The Court: I am getting tired of your attempts to testify, Counsel. Please stop it.

Mr. Turtur: No, but your Honor made a statement; I want to show——

The Court: I sustain the objection.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Turtur: Now may I ask Dr. Gettler, please, what specifically he does in the field of toxicology so that your Honor might rule once and for all as to whether or not I am permitted to ask the various questions as to the effect of certain chemicals upon certain tissues, because that is his principal sphere.

The Court: The medical effect?

Mr. Turtur: No, the chemical effect upon those tissues.

The Court: We have had that.

[fol. 518] Mr. Turtur: The toxic effect, your Honor please, and that is his field, toxicology.

The Court: You must have a doctor—I have ruled that way before. Can't you get a doctor to testify to that effect?

Mr. Turtur: Your Honor brought out the last time what Dr. Gettler's qualifications were in the field of toxicology besides chemistry, and of course toxicology coupled with chemistry——

The Court: What do you want him to say, that the irritating effect on the lungs produces the abscess, is that what you want him to say? He is not an expert in abscesses.

Mr. Turtur: No, but he is an expert in the field of toxicology.

The Court: I understood an abscess was a medical fact.

Mr. Turtur: Well, your Honor please, here is the New York University Bulletin, Washington Square College, 1934-5, where Professor Gettler——

Mr. Rudner: Now, your Honor please, I object to any reading from any books. Dr. Gettler stated his qualifications, what he does; that is enough.

Mr. Turtur: Now may I get through, if the court please?

[fol. 519] Mr. Rudner: Your Honor please, I never heard of such self-serving questions and speeches by counsel before. They are continuously so.

The Court: They are beyond the ordinary limits, I must say.

Mr. Turtur: No, I want to show, your Honor, what Professor Gettler does and what he teaches, and the reason I propose that——

The Court: Lectures there on the effect of toxic substances on the lungs?

Mr. Turtur: Yes.

The Court: Have you it in your hand?

Mr. Turtur: No, not in my hand but there is a list of lectures of Professor Gettler in that field, a list of them here. They are, your Honor——

The Court: In what field?

Mr. Rudner: Your Honor please, we all know that toxicology deals with the effect on the man's lungs after his death or stomach—they ooze the liquid out and test it. That is toxicology.

The Court: You are trying to get Dr. Gettler, as I understand it, to testify to a disease of the lungs. Dr. Gettler [fol. 520] would never even think of claiming that he is an expert in diseases of the lungs, whatever kind of diseases they may be.

Mr. Turtur: May I ask——

The Court: You can call lung specialists, if you like, to determine the effect of irritants on the lungs.

Mr. Turtur: But they have already testified to that, your Honor please.

The Court: You had one doctor who testified, yes.

Mr. Turtur: And Dr. Gluckman testified and so did Dr. Runnells. Now, I say to your Honor that Professor Gettler teaches the very subject that I am about to ask him on.

The Court: Injury to the lungs?

Mr. Turtur: As to the effect of irritants on the human tissues.

The Court: On the lungs?

Mr. Turtur: On the lungs also, yes, sir.

The Court: Dr. Gettler has already testified to the effect that in his opinion the application of countless particles of soda ash to the lung causes abscess. He has already testified to that fact.

[fol. 521] Mr. Turtur: So that there wouldn't be any doubt, your Honor please, I wanted to bring before the court and the jury the particular qualifications of Professor Gettler in the field of toxicology and which includes every conceivable human organ and the effects of certain chemicals upon those specific organs, and that is the very subject that he teaches to physicians in post graduate work, and that is the subject, please, in which he helps physicians arrive at certain diagnoses.

Mr. Rudner: Your Honor please, I must stop these self-serving statements of counsel.

The Court: What do you want to ask him? Ask the question.

Mr. Rudner: Your Honor please, your Honor made the statement which I don't think is in accordance with the testimony in this case—Dr. Gettler testified he had no experience in connection with inhalation of dust of any kind. Your Honor, therefore, would not permit Dr. Gettler to testify with respect to any circumstance connected with inhalation. All Dr. Gettler testified was that assuming you have lung tissue coming into contact with some highly irritating pow-[fol. 522] ders or chemicals, it will cause a corrosive effect.

The Court: That is what I meant.

Mr. Rudner: Dr. Gettler hasn't gone beyond that with respect to an abscess.

The Court: No, that is as far as I am going to permit him to go.

Mr. Turtur: Supposing his qualifications are much broader than that from the standpoint of his subject, my question was, your Honor please—may I propound it again and your Honor rule?

The Court: Yes.

By Mr. Turtur:

The question is: What are the chemical or physical properties contained in the skin and lung tissue?

The Court: Of course, that is a harmless question. I don't see the point of it.

Mr. Turtur: Then I have another question——

The Court: Go ahead.

Mr. Turtur: —to propound after that.

Q. Will you answer that?

Mr. Rudner: I object on the ground Dr. Gettler is not qualified with respect to that subject matter.

[fol. 523] Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Well, Doctor, will you please give your qualifications in order that you might answer that question?

Mr. Rudner: We have had Dr. Gettler's qualifications, I think.

Mr. Turtur: Your Honor permitted it.

The Court: Will you stop making speeches, Counsel, you have been really very trying.

Mr. Turtur: But your Honor please, he is now questioning the qualifications of Dr. Gettler. Now I ask him to give to the court and jury just exactly what his qualifications are so that he may answer the question that he is objecting to, so that there will be no question about his qualifications.

The Court: I say he may answer the question. You may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 524] A. I have taught for many years in Bellevue Medical College to medical students the analysis of all the various tissues, brain tissue, skin tissue, the muscle tissue, the liver tissue—I have taught analysis to determine the composition of the various tissues of the human body.

Q. And for how many years?

The Court: No one that I know of disputes the chemistry of the tissues of the lung, do they?

Mr. Turtur: I don't know, your Honor please.

The Court: Well, do they?

Mr. Turtur. No. Now I am going to ask him to please answer the question, in view of the fact he says for many years he has been teaching the particular subject.

The Court: Do you want to know the chemistry of the lungs?

Mr. Turtur: No, I asked him what the chemical or physical properties were contained in the skin and lung tissue.

The Court: Yes, he does know. What are they? No one disputes it.

A. Well, the chemical composition of the lung——

The Court: You gave it, I thought, the other day.

[fol. 525] A. I gave it the other day.

The Court: I thought he did too.

Mr. Turtur: I didn't remember, your Honor please, whether he did give it.

Q. Now, Doctor, in view of that is the effect of the application of molecules of soda ash the same when applied to the human skin and to the lungs when breathed in?

Mr. Rudner: Objected to on the ground the Doctor very frankly says he is not qualified with respect to any matters pertaining to the inhalation of dust.

Mr. Turtur: Your Honor has permitted the question in view of the Doctor's qualifications?

The Court: I have not, Counsel, and I must warn you again you imperil your client's interests by your undue persistence.

Mr. Turtur: Does your Honor overrule the question?

The Court: Yes, it is already answered; both the Doctor and I think, so far as pertinent, it is already answered.

Mr. Turtur: Very well, your Honor, if you think it has already been answered, I didn't recall it, so that was the reason for my propounding the question.

[fol. 526] Recross-Examination.

By Mr. Rudner:

Q. Doctor, you testified to a child or children dying because they had taken washing soda, that is soda ash instead of bicarbonate of soda, by mistake. Now, as a matter of fact, would not the same result come about——

A. One minute, please——

Q. Beg pardon?

A. Excuse me, I didn't say that it was put in instead of bicarbonate of soda.

Q. Taken instead of bicarbonate of soda.

A. No, no, I didn't say that.

Q. Well, somebody drank it, some child.

A. I simply said that someone in the wards threw washing soda, soda ash, into the container which contained milk sugar.

Q. All right.

Mr. Turtur: Let him finish.

A. Not made a mistake in the formula.

Q. Some child did drink a quantity of washing soda, soda ash, some child, and as a consequence died, is that correct?

A. About four or five children.

Q. Four or five children, all right. Would not the same effect have come about with those four or five children had they drunk a large amount of sodium chlorid, which is ordi- [fol. 527] nary table salt?

A. If they would have taken the same amount of sodium chlorid as they got sodium carbonate they would not have been affected.

Q. Well, suppose they took a larger quantity of salt?

Mr. Rudner: I object to the supposition, your Honor please.

The Court: Sustained.

A. I can kill a human being with salt if I give him pounds and pounds of it; you can kill a human being with anything if you give him pounds and pounds of it.

Q. Did you examine the quantity of the soda ash these children drank?

A. Yes.

Q. You actually examined the quantity?

A. Yes—excuse me——

Q. Have you examined quantities——

Mr. Turtur: Just a minute, Mr. Rudner.

Mr. Rudner: He answered yes.

Mr. Turtur: No, he is trying to answer your question, he said "Excuse me," Mr. Rudner.

A. I didn't determine how much they received, that is impossible; I wasn't there. I determined how much was present in their organs at the time of death.

Q. That's right, you couldn't tell how much they drank [fol. 528] because some part may have gone out of the system at the time you got there?

A. Yes.

Q. And your examination was post mortem?

A. Yes.

Q. And in the ordinary course of events some of that soda ash which they swallowed would have passed through the system, might have, and gone out of the system?

A. Yes, any foreign substance a human being takes in the body, tries to get rid of it as rapidly as possible.

Q. Now, if a child drank sodium chlorid, which is ordinary table salt, in sufficient quantity, that might also bring about the child's death?

A. I answered that. I said if you give an excessive amount of any substance you can kill an individual; you can kill an individual by giving him excessive amounts of water.

The Court: Is that all?

Mr. Rudner: Yes.

The Court: Thank you, Dr. Gettler. Will you show your hand now to the jury, Dr. Wiener, and then I think you also, Dr. Wiener, will also submit that quantitative analysis.

[fol. 529] Dr. Wiener (to the jury): The left is sodium hydroxid; it resulted in a burn, just a little bit of it. The right hand shows practically nothing, the soda ash.

The Court: Dr. Gettler, will you listen to this statement, please?

(Statement repeated by the reporter.)

Mr. Rudner: Dr. Wiener, in connection with your right hand, you rubbed that substance in, did you not?

Dr. Wiener: I rubbed it in each of them.

Mr. Rudner: Rubbed both?

Dr. Wiener: Rubbed both hands.

A Juror: Is there any mark there? (Referring to the right hand.)

Dr. Wiener: It is a little whiter, it bleached it a little but that (referring to the left hand), it is the same there and also at that point it is still burning in there. I will put some acid on it.

Mr. Turtur: Did the chemical to your right hand have an irritating effect?

Dr. Wiener: No.

Mr. Turtur: Your hand was not perspiring at the time.

Dr. Wiener: No, I wet it with water.

[fol. 530] Mr. Turtur: Nor were you subjected to any excessive heat at the time of application?

Mr. Rudner: Your Honor please, that is a ridiculous question. The jury saw the circumstances under which that was put on. The question now is "Nor were you subjected to excessive heat."

Mr. Turtur: That's right. Mr. Rudner asked a question and I have a right to ask a question.

The Court: I sustain the objection. Thank you, Doctor. And you send in the quantitative analysis, will you? How long will that take you?

Dr. Wiener: Of what?

The Court: Of the relative amount of hydroxyl ions in the two substances and the authority that you have for it.

Dr. Wiener: I will do that.

The Court: Will you do that within a day?

Dr. Wiener: Yes, sir.

Mr. Turtur: Your Honor, may I recall Dr. Gettler for just half a moment?

The Court: Certainly.

ALEXANDER O. GETTLER, recalled.

By Mr. Turtur:

Q. Doctor, can you tell the reason, from your experience [fol. 531] and from your profession and your many years of training, why, in the one hand, Dr. Wiener had a burning effect and in the other, the soda ash, he did not?

Mr. Rudner: Objected to as incompetent, irrelevant and immaterial.

Mr. Turtur: Oh, it is very material, your Honor please.

The Court: I could tell that myself, one is stronger than the other. That is what we have cleared up this morning.

Mr. Turtur: Yes, your Honor please, but now I want Dr. Gettler, if you please, to allow him to tell the court and jury what are some of the substances of the skin and too those of the lung to explain the difference, why it affects the left hand a certain way and why it didn't affect the skin in this other way. That certainly gives us light on the subject.

Mr. Rudner: Your Honor please, counsel has had plaintiff's physician state that this soda ash was so powerful that it burned the skin off a person's body. The testimony of Dr. Gluckman was this was a powerful caustic. That is all changed.

[fol. 532] The Court: I answered it correctly, didn't I, when I said because it was stronger?

The Witness: Yes, the sodium hydroxid is stronger than the sodium carbonate.

The Court: The experiment with respect to Dr. Wiener's hands was only for the purpose of the effect on the skin of the hands, the effect of one was more than the other, that's all it proved and nothing else; it wasn't attempting to show anything to do with the lungs.

Mr. Turtur: No, but your Honor please, I was wondering if your Honor wanted the reasons for the chemical reaction to the skin and the reason of the chemical reaction to the lung.

The Court: Dr. Gettler, I suppose, would say that the tissue of the lung is more sensitive, wouldn't you, Doctor?

The Witness: Yes, sir.

Mr. Turtur: Than that of the skin. That is all.

The Court: All right, gentlemen, two o'clock.

(Recess.)

[fol. 533] Afternoon Session.

The Court: Go ahead, Mr. Rudner.

Mr. Rudner: Does plaintiff rest now, so that the record may be straight, your Honor please?

The Court: What?

Mr. Rudner: Does the plaintiff rest now, Dr. Gettler having testified?

Mr. Turtur: The defense was on, your Honor. The only reason it was reopened was because of your Honor's direction to me to bring Professor Gettler.

The Court: I don't think you need trouble yourselves with such technicalities on either side. I don't think the Court of Appeals will pay any attention to it.

Mr. Rudner: I think I am required under the rules to renew my motions made at the close of the plaintiff's case.

The Court: You may if you want but I will rule the same way.

Mr. Rudner: One other motion I desire to make is that the testimony of Dr. Runnells and Dr. Gluckman be stricken out, the answers to the hypothetical question, on the [fol. 534] ground that it was predicated, as I recall it, on the soda ash dust in combination with water being a caustic, which is the equivalent of sodium hydroxid.

The Court: Well, I don't recollect whether the testimony was to that effect. You had better look and see whether their testimony was based on that.

Mr. Rudner: I am assuming that it was such.

(The reporter at this point read the following testimony:)

"The Court: The Doctor has given it as his opinion that if there is this irritation of caustic soda, that that might be a producing cause of the abscess, isn't that correct, Doctor?

"The Witness: Yes, sir."

The Court: I will strike that answer.

Mr. Turtur: May I object on the ground that the objection is too late.

The Court: You made a great mistake in not bringing out the true chemical effects, trying, as I think, to exaggerate them, a great mistake.

Mr. Turtur: I didn't try to exaggerate them.

The Court: Well, they were exaggerated somewhat.

[fol. 535] Mr. Turtur: Well, the word "caustic" was used in the testimony.

The Court: And it is not true in fact and the word "sodium hydroxid" was used and that is not true in fact.

Mr. Turtur: But your Honor please, the testimony of Mr. Matey shows that he worked in and about also some of that and your Honor in propounding the question——

The Court: Some of what?

Mr. Turtur: With some of the caustics, in the mixing of it with caustics.

The Court: Don't misquote the testimony.

Mr. Turtur: I will show it to your Honor if you will permit me to.

The Court: What is your motion?

Mr. Rudner: My motion is to strike out such portions of the testimony of Dr. Runnells and Dr. Gluckman——

The Court: Well, wherever the words "caustic soda" or "sodium hydroxid" appear they will be stricken.

Mr. Rudner: As to Dr. Gluckman and Dr. Runnells?

The Court: Both doctors.

[fol. 536] Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Turtur: Your Honor, may I at this time ask the court's permission to permit me to introduce these charts in evidence that have been used and looked at by the jury?

The Court: Certainly.

Mr. Turtur: And your Honor, I think, directed me to offer these tubes in evidence; that's so, isn't it?

The Court: I guess they are in evidence.

(The charts are here marked Exhibits P-11, P-12 and P-13.)

Mr. Turtur: I offer the four tubes in evidence.

(Received and marked Exhibit P-14.)

Plaintiff rests.

RENEWAL OF MOTIONS.

Mr. Rudner: Now, your Honor please, I renew each and every motion I made at the conclusion of plaintiff's case originally with respect to striking out testimony with respect to the amendment and with respect to the non-[fol. 537] suit, I urge on the additional ground that Dr. Gettler has changed his testimony from the final chemical being sodium hydroxid to something else.

The Court: Denied.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: May I call Mr. Heard out of order so he can go back to Syracuse tonight?

JOSEPH R. HEARD, recalled on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mr. Heard, in the Solvay Process Company plant at Syracuse is soda ash manufactured?

A. Yes, sir.

Q. And in that department where soda ash is manufactured do you come in direct contact with the men, with the factory itself, and are you in direct contact with the premises wherein this soda ash is manufactured?

A. Yes, sir.

[fol. 538] Q. How frequently are you there?

A. It is irregular; on some days I may be out in that plant constantly for eight hours, other days I may be in another section of the plant and not in that section at all that day, but inasmuch as that is the biggest part of our plant I spend a large part of my time out there, either out there on some work I am particularly interested in directing myself or in connection with the work that the men are doing for me.

Q. Has that been the situation in the whole time you have been with the Solvay Process Company or during the time you have been plant chemist?

A. That situation has been during the time that I have been plant chemist.

Q. And how long has that been?

A. It is two years this fall; I don't recall the exact month.

Q. And prior to that were you in any contact or did you visit and come in contact with the men in the soda ash department?

A. Just prior to when I was plant chemist I had the title of Technical Assistant in the soda ash section, then I spent all my time in the soda ash section.

Q. Oh, you spent all your time?

[fol. 539] A. Yes, I was the Technical Assistant assigned to that section; I didn't have to spend any time in the other parts of the plant.

Q. So your work did not go beyond the scope of the soda ash department?

A. During that period, that's right.

Q. And how long was that period?

A. About a year.

Q. Now, prior to that year period what connection or contact did you have with the soda ash department?

A. Prior to that I was assistant plant chemist assigned to the soda ash section. There is a slight distinction there. When I was assistant plant chemist I was a member of the chemical laboratory organization but I was assigned to the soda ash section to do work out there on anything where they needed chemical help so that I spent my time out there then.

Q. How long were you acting in that capacity?

A. I would say about two years, as near as I can recollect now, about two years.

Q. During the whole time that you have been in the Solvay plant you have been in more or less contact with the soda ash department?

A. Well, no, during this time up as far as we discussed now I have been.

[fol. 540] Mr. Turtur: Your Honor please, I would like to interject an objection at this time along this line of examination in that whether or not he has been in contact with it certainly is not in contact with it at the Grasselli Company plant, it is incompetent, irrelevant and immaterial.

Mr. Rudner: I will bring it out, I cannot do it all in one or two questions.

Mr. Turtur: What is your Honor's ruling?

The Court: I will allow it.

Q. You also have a department where they manufacture sodium hydroxid?

A. We have two departments that manufacture sodium hydroxid.

Q. That is at the Solvay in Syracuse?

A. Both of them located at Syracuse.

Q. They, of course, are departments independent of the soda ash department?

A. Yes, sir.

Q. Now, you actually manufacture sodium hydroxid at the Syracuse plant?

A. Yes, sir.

Q. Of what is sodium hydroxid made at your plant?

A. We have two processes, in the one case we make the sodium hydroxid from soda ash plus milk of lime; in the [fol. 541] other operation we make sodium hydroxid by the electrolytic means using salt brine and an electric current whereby we make sodium hydroxid or caustic soda plus chlorine due to the decomposition of sodium chlorid in water.

Q. Now, what contact have you had with the sodium hydroxid department where they make the sodium hydroxid?

A. I am in and out of that plant at irregular intervals in connection with work being done there by the plant laboratory men or to look at something that I am particularly interested in myself, not necessarily that one of my men would be working on, it might be under either conditions.

Q. How often did you get into the sodium hydroxid department?

A. There may be weeks when I won't go in there; on the other hand, there are times when I am in there every day. It is hard to answer it clearly, but it depends on what we are doing there at the time. All winter it so happened I was in there every day. Right now I am not going in there, probably may not go in for a week or two weeks.

Q. How many men do you have working in the sodium hydroxid departments?

A. Well, I don't know the exact number but I would [fol. 542] say probably 150 men.

Q. Now, there is no connection, is there, between the Grasselli Company plant and the Solvay Process Company plant?

A. None that I know of.

Q. They buy, of course, your soda ash?

A. That is the only connection.

Q. Now, you have been through the silicate department of the Grasselli Chemical Company?

A. Yes, sir.

Q. When did you go through?

A. Yesterday.

Q. In going through there what rooms did you visit?

A. A room where they draw the soda ash out of the storage bin; then into another room where they have a mixer and from which the mixture goes on out to some furnaces and out in that room and onto another portion there where they discharge the sodium silicate into a mill. That is what I would call it. I looked around——

Q. The metasilicate room next to the furnace room was not in operation, was it, yesterday?

A. Metasilicate?

Q. The metasilicate room next to the furnace room, was [fol. 543] that in operation yesterday?

A. Well, I may be confused but I was in around the furnaces; then we went along, there was a conveyor carrying the material discharged from the furnace.

Q. That is where the furnaces are?

A. Yes, went along that conveyor to where it is discharged into a mill, and that was as far as I went in that building.

Q. Now, in your soda ash department do you have furnaces in operation?

A. Yes, sir.

Q. Is that part of the process of manufacturing soda ash?

A. Yes, sir.

Q. Now, what are your dust conditions in the soda ash department of your plant?

Mr. Turtur: I object to that.

Q. Having regard to the dust conditions of the Grasselli plant silicate department as you observed them yesterday.

The Court: You were going to get me some authorities, as I thought, Mr. Rudner, for the questions. Have you got them?

Mr. Rudner: Yes.

The Court: No, that case you had the other day, that [fol. 544] wasn't in point.

Mr. Rudner: I am still having somebody examine the law on that question. I will have it for your Honor tomorrow morning.

The Court: The first case you cited me has to do with notice.

Mr. Rudner: That is the converse.

The Court: Are these nothing but the converse—are they?

Mr. Rudner: The first one——

The Court: I don't want to shout at you, Mr. Rudner, but tell me when you don't hear. I want cases which show that you can offer testimony with respect to other plants. That is not very difficult, is it? You are trying to ask this witness to tell you that conditions in other plants were bad and that nobody got ill. Now, I want cases that support that theory, because my view of the law was that it is not admissible.

Mr. Rudner: The case at the bottom of page 1, the main case, does not deal with plants but deals with different situations, the same chemicals, and the fact they had no effect on other persons. This particular case deals with plants.

The Court: Yes, that is in point. You would have to show [fol. 545] though that the circumstances are the same.

Mr. Rudner: I am leading up to that.

The Court: All right.

(Question repeated by the reporter.)

The Court: You may answer.

A. We have more dust than I saw yesterday when I visited the Grasselli plant.

Q. To what extent? Just explain exactly what dust conditions you have reference to.

A. Well, we have a row of twenty-nine driers, furnaces or driers as we call them.

Q. How many?

A. Twenty-nine—from which the soda ash is being discharged. We have some dust from that. We have packing operations where the soda ash is being put into barrels or into bags or loaded as bulk soda ash into freight cars, from which we get dust. In between the driers and the packing operations we have conveying equipment which are enclosed but leak dust.

Mr. Turtur: But what?

The Witness: But will leak dust.

A. (Continuing.) In other words, we are handling soda ash through the operation continuously and get dust from any one of these various points, so that there is soda ash dust in that building continuously.

[fol. 546] Q. Is that where the men are actually working, in the soda ash department?

A. Oh, yes, there are men in there on a number of different jobs in that one department.

Q. Is the soda ash visible in the air and about the building?

A. Oh, yes, you can see the soda ash.

Q. How does it show itself, on parts of the building?

A. On beams, roofing, trusses, they are covered with soda ash dust which has accumulated during the period of time, mounds of soda ash dust; soda ash dust has settled on equipment around the building there. There is soda ash dust, of course, on the floor, soda ash dust everywhere around that building.

Q. How long do these people work on shifts in the soda ash department?

A. The shift men work eight hours per shift; then there is another shift comes on and relieves them.

Q. Three shifts eight hours each?

A. Yes, that's right.

Q. Would any man during the course of an eight hour shift be continuously subjected to the dust conditions of which you speak?

A. Yes, there are men there who are continuously exposed to the dust.

[fol. 547] Q. And how long have those men been working, to your knowledge, in the soda ash department?

A. I can speak absolutely so far as my own experience——

Q. As far as you know.

A. There are men there who were working there when I went to work for the company in 1924 and they are still there. They were working there prior to that, according to the company records.

Q. Now, do the men in that particular department wear any respirators?

A. No, sir.

Q. What is your judgment or opinion with respect to the chemical qualities of soda ash dust, particularly as regards whether you consider it dangerous or not to employees working in it?

Mr. Turtur: What is that question? I didn't get it.

(Question repeated by the reporter.)

Mr. Turtur: I object to the question, please, unless the specific condition under which Matey worked is given to this gentleman before he can answer because what may have happened in one plant is entirely different to what may happen in another. We don't know whether he was subjected to the same kind of dust.

The Court: You may answer.

[fol. 548] Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. Taking into consideration the conditions we have had at the Solvay Process Company plant at Syracuse, I don't consider the dust there as being dangerous, the soda ash dust.

The Court: I don't see why—he is not a doctor, how does he know whether it is dangerous or not?

Mr. Rudner: That merely goes to the element of knowledge, your Honor please, in connection with the charge of negligence, on that theory only. You see, the plaintiff charges this, that the soda ash produced a dust, that this dust was dangerous, that defendant knew it was dangerous and it is the dangerous effect on which they predicate their whole case of negligence. It is merely a step.

The Court: I will strike that answer out.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 549] The Court: Now, what you should do, Mr. Rudner—I don't want to get both sides to tell them how to try their case, but it does seem necessary—you should have the dust contents measured in these respective plants and then you could show perhaps at the other plant no one was injured by it. That's the way to come within the rule of the case you gave me, not to have a chemist who knows nothing about the dangerous qualities of the dust one way or the other, say it is not dangerous.

Mr. Rudner: We have had the Grasselli tested. I will have a witness as to that.

The Court: Has this one been tested?

Mr. Rudner: You mean the Solvay?

The Court: Yes.

Mr. Rudner: No, as far as we know we haven't made a test of that.

The Court: His testimony then will be stricken.

Mr. Rudner: Of course, your Honor please, it has evidential value in this respect, this man——

The Court: You gave me a case which went to the extreme limit, I should say, which asked leave to show the same [fol. 550] chemicals, the same mass, used under the same circumstances, contained nothing deleterious. Now, you can only show from him the same dust, this soda ash, in the same quantity, which of course he doesn't know about.

Mr. Rudner: Greater quantities.

The Court: And used under the same circumstances. That's all you can show from him. You tried to ask him whether it contained anything deleterious, which he has no knowledge of one way or the other, not being a doctor.

Mr. Rudner: But your Honor please, this witness has testified that based upon his observation yesterday the dust condition in the soda ash department at Solvay was worse than the dust conditions he observed yesterday. Now we are going to tie this up through other witnesses as to what the dust conditions at Grasselli have been with respect to the examination yesterday.

The Court: You don't need such an elaborate, long time-wasting. You have a way of measuring dust. Why not measure it in all the soda ash plants in the country that you like and then show that none of those plants had any illnesses as a result among their employees, if you can?

[fol. 551] Mr. Rudner: We can't go around the country examining dust.

The Court: Well, whatever plants you select.

Mr. Rudner: Well, we had Dr. Chaffe's testimony with respect to what he observed there. Now Mr. Heard is elaborating with respect to dust conditions.

The Court: He doesn't know whether a dust is dangerous any more than I do.

Mr. Rudner: Well, he is a chemist, he ought to be able to state whether in his opinion it is dangerous.

The Court: His opinion is of no value except as a chemist.

Mr. Rudner: Your Honor has stricken out the last answer?

The Court: Yes.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: That is all. Cross-examine.

Cross-examination.

By Mr. Turtur:

Q. Are respirators worn at all in the department where soda ash is manufactured or stored?

A. Yes, sir, we have a what we call bulk soda store [fol. 552] house where——

Q. That is where a person is subjected and forced to inhale this soda ash in great quantities, isn't that so?

A. No, sir. May I elaborate?

The Court: Yes, let the witness tell it, please, Mr. Turtur.

A. There are respirators available for the men working in there if they want to use them because of one particular reason: this soda is in a very large building, is piled up in great mounds 20 or 30 feet high and the workmen go in there to dislodge the soda if it slides down into conveyors and if a man isn't careful he will build too steep a bank so that it has happened once in a great while that he will dislodge so much soda that it will bury him under the soda.

Q. Well, is that the only reason then that respirators would be worn, just for the purpose of the fear of burying the man?

A. Yes, sir, or if a man wants to use them in working around in the building—there is only a few men working in there.

Q. Why do you have respirators in one department and not in the other, other than the fact that you are afraid that the man would be buried?

[fol. 553] A. My answer is that we do not consider the soda ash dust that we have there of a dangerous character.

Q. What kind of respirators do you use?

A. The common respirator that we have available is a device that fits over the nostrils and mouth with a wet sponge to draw the air through.

Q. And how would that protect the men if they are buried?

A. It gives them a chance, there is enough air with the soda so that they can keep on living, and it keeps it out of their mouth and nostrils so that they can pull some air through. There is never a man in there but there is another man with them. Immediately that happens they of course have to get them out as quickly as they can.

Q. You are sure respirators are not worn by men because of any irritating qualities of this soda ash?

A. That's right, I am sure of that.

Q. You are sure of that?

A. Basing it on the fact that in the other parts of the plant where we make and use soda ash they don't use the respirators.

Q. Were you here when Dr. Chaffe testified?

A. No, sir.

Q. Is soda ash irritable to the skin, irritating?

A. If there is enough of it it is.

[fol. 554] Q. Enough of it it is?

A. Yes.

Q. And is it also irritating to the tissues?

A. I would say the same answer, if you have enough of it, yes.

Q. Yes. And for that purpose you would wear a respirator, wouldn't you?

A. Where conditions are bad enough so that you run into those conditions.

Q. Yes. So that respirators would be worn for other purposes than to be afraid that they might be buried, isn't that so?

A. Not in our plant.

Q. Not in your plant?

A. No.

Q. Anybody ever get any skin trouble up in your plant, dermatitis?

A. Not that I know of. I am not in that sort of stuff, I don't know of anybody.

Q. You don't know?

A. No, that would come in the medical work.

Q. Do you know whether any of the men ever become sick in that department or don't you know?

Mr. Rudner: Sick of what?

Q. Sick of anything.

[fol. 555] Mr. Rudner: Well, your Honor please, all of us get sick; we have got to bring that down in connection with soda ash.

The Court: Yes.

Q. In connection with the manufacture of the substance.

The Court: Have you ever had any cases of lung abscess? That is what he is trying to ask you.

The Witness: Well, your Honor, I would have to say that we haven't had any case that I know of.

The Court: Or any other form of pulmonary disease?

The Witness: Not that I know of, your Honor.

Q. There may have been and you don't know of any?

A. That's right, I cannot speak for that.

Q. Is the Solvay Process in any way connected with the Grasselli Chemical Company?

A. Only as far as I know the only connection we have is that the Grasselli Chemical Company is a customer of the Solvay Process Company.

Q. Yes, and other than being a customer it is also one of the group of the Allied Chemicals, isn't it?

A. No, sir.

[fol. 556] Q. Well, then, Dr. Chaffe was wrong?

The Court: Allied Chemicals has nothing to do with the Grasselli Chemical.

Mr. Turtur: That is what Dr. Chaffe said, your Honor please.

The Court: No, I don't think he did, you are mistaken.

Q. You personally weren't subjected and have not been subjected to the soda ash department at all times, have you?

A. All during the time I have worked for the company.

Q. Yes?

A. No.

Q. And you personally, Mr. Heard, haven't been around the furnaces when this soda ash was being transformed into some other chemical?

A. We don't transform soda ash into any other chemical.

Q. What do you transform it to, do you manufacture it to some other product?

A. In the soda ash building?

Q. Yes.

A. No, sir, that is where we make soda ash as such.

Q. You don't have a department then where from soda ash and sand they make silicate glass?

A. We don't make silicate.

[fol. 557] Q. No. And do you know whether or not any of your men were ever subjected to any puffing from these furnaces where soda ash and sand comes in contact with these men?

A. The soda ash but not the sand.

The Court: You are not claiming injury from sand.

Mr. Turtur: No, your Honor.

The Court: Then please leave sand out.

Q. The soda ash I am referring to.

A. Oh, yes.

Q. Do your furnaces puff too and are these men subjected to that kind of puffing all day long?

A. We have clouds or discharges, sudden discharges of soda ash.

Q. Yes. And how often are those discharges?

A. It is irregular, it may be either from the driers or from our storage bins; we run into that there.

Q. Well, regardless of the storage bins, I am talking about the furnaces, please. How often does this puffing or backing up occur, if you know, of course?

A. They have a condition like that certainly once a day on every drier. There are conditions where they clean the drier, see.

Q. And sometimes more?

[fol. 558] A. Sometimes more.

Q. And sometimes every five minutes, depending upon the condition of the drier?

A. Well, no, probably five minutes is too frequent an interval.

Q. Well, every ten minutes sometimes?

A. Well, you are approaching the order where we might run into it something like that.

Q. Yes. And being subjected to that soda ash over a period of year-, would you say that it would become so irritating as to harm the human——

Mr. Rudner: Your Honor please, this witness hasn't qualified on that.

Mr. Turtur: You tried to qualify him.

The Court: And I sustained your objection. I will sustain now your opponent's.

Mr. Rudner: If you want to limit it to that plant you can go as far as you want.

Q. Is soda ash a strong alkali?

A. We class it as midway on the alkalis.

The Court: We have gone into that at great length.

Q. Is it an irritant?

The Court: This is not a toxicologist.

Mr. Turtur: He is a chemist; I suppose he knows whether [fol. 559] it is an irritant or not.

The Court: To what?

Mr. Turtur: To the skin and the membrane.

The Court: He is not a toxicologist.

Mr. Turtur: I will withdraw it, your Honor.

Q. You wouldn't be surprised, would you, if you were told with proper evidence that there were cases of irritations due to this soda ash——

Mr. Rudner: Object to it on the ground that there has been no testimony with respect to that.

The Court: Sustained.

Q. Have you any ventilators of any sort in your plant?

A. Yes, sir, we have.

Q. Whereabouts?

A. We have ventilators in the roof over at one side of the building.

Q. Electric ventilators, exhausts?

A. Fans.

Q. That's all. Thank you very much.

Mr. Turtur: Now, your Honor please, I would like to make a motion at this time that all the testimony of Mr. Heard be stricken on the ground that the conditions under which their manufacturing plant and the Grasselli operate [fol. 560] are entirely different. They have ventilators there and in the Grasselli plant they do not. Further than that, they supply respirators at the Solvay plant and they do not at the Grasselli, so that certainly the conditions are not the same.

The Court: Motion denied. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

F. A. Abbott, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mr. Abbott, where do you live, sir?

A. Cranford, New Jersey.

Q. And what is your business or occupation?

A. I am State Inspector assigned to District I, Department of Labor, State of New Jersey.

Mr. Turtur: Your Honor please, I don't mean to interrupt but at great inconvenience I brought Professor Gettler back here and Mr. Rudner promised he would put in his chemical testimony. Now may we go into the chemical testimony rather than the inspector? I think that is a [fol. 561] reasonable request, please.

The Court: I thought you completed your chemical testimony.

Mr. Rudner: No, I have Mr. Davis, please, but I am just calling Mr. Abbott so we won't need him tomorrow, two very short witnesses.

Q. How long have you been an inspector, Mr. Abbott?
A. 9 years and 4 months in this Department.
Q. Are you connected with any special division of the Labor Department?
A. The Inspection Bureau.
Q. And inspection of what?
A. Inspection of factories, mills, workshops, bakeries and confectionery shops.
Q. And has that been your special activity in connection with the Labor Department for 9 years?
A. Yes.
Q. Were you at one time assigned to the inspection of the Grasselli Chemical Company plant?
A. I was assigned to the Grasselli Chemical Company plant, it was in my district and in the regular course of inspection I have been assigned to make periodical inspections.

[fol. 562] The Court: Do you make written reports, Inspector?
The Witness: Written reports are made.
The Court: Have you got them?

Q. Was the Grasselli part of your district?
A. It was.
Q. And for how long, Mr. Abbott?
A. I believe in nineteen——

The Court: Have you got your written reports?
Mr. Rudner: I have them here, sir.
The Court: All right, let's get down to them. Soda ash department, phosphate department?
The Witness: All departments.
The Court: I mean could you find that in your reports, Mr. Abbott?
The Witness: No designated departments.
The Court: Let me see your reports, let me see the reports—let me see them.
The Witness: There is also the medical inspector's report.
The Court: I just want to get this witness' report. Can

you show me your report? Look at them. They are pretty messy looking. Let's see if you can disentangle them.

Mr. Turtur: I presume your Honor means the soda ash [fol. 563] and the phosphate department?

The Court: I asked him that.

The Witness: All these reports include the soda ash department.

The Court: Let me see your reports, please, all of them.

The Witness: Right in this group here.

The Court: What does this group consist of, the sheets, please?

The Witness: There is the inspection report here.

The Court: Get all of them and then I will ask you about them all that you made.

The Witness: There is one more which is underneath here.

The Court: Get them all that you made.

The Witness: There is a more recent one made this year.

The Court: You only made three?

The Witness: Three inspections at that time.

The Court: Well, I mean you didn't make any more?

The Witness: I have made one since this but it is not here, possibly made one last month; that doesn't show in the records yet.

[fol. 564] The Court: All right. These are two reports then,—well, one is a personnel report, isn't it?

The Witness: No, in each report, of course, we designate the number of employees employed in the plant at the time of our visit.

The Court: One is made March 20, 1930.

The Witness: Here is one May 27, 1929.

The Court: All right, when, May,—it looks like June to me.

The Witness: That's right.

The Court: June 27, 1929, signed by you, Mr. Abbott.

The Witness: That's right.

The Court: And it says "City of Linden, males 1010, females 5." That's all I see. "This memorandum is to be filled out when conditions do not warrant an order or letter." That's all on that report,—a little vague, isn't it?

The Witness: No, these reports are made where there was no violations, I believe; where it is not necessary to issue an order of this type one of these memorandums is issued; where we consider everything is in exceptionally good shape, where there is no violations on the building, one of these memorandums is issued.

[fol. 565] The Court: What do you call a violation?

The Witness: Of the State Factory Laws of New Jersey.

The Court: What does that say?

The Witness: It would take an indefinite time, sir, to get all the laws, there is a complete volume of laws.

The Court: But you are making the inspection; I suppose you are supposed to know what is in the law, don't you?

The Witness: We do.

The Court: All right, then tell me.

The Witness: Want an outline of how the factory is inspected, what we look for?

The Court: Yes, otherwise what does your inspection amount to?

The Witness: We go to a plant, inspect it for structure——

The Court: We can leave that out of this case because there is no structural defect. What else do you inspect it for? Sit down, Inspector.

The Witness: Dust hazards, sanitation, ventilation, mechanical, electrical, fire prevention——

The Court: Now, there is a well known apparatus for [fol. 566] testing dust; what is it called?

The Witness: Entomometer.

Mr. Rudner: Impinger.

The Witness: Entomometer, for speed, &c., but I don't know the name of the apparatus that is used——

Mr. Rudner: Impinger.

The Court: Dust count it is called, like a blood count.

Mr. Rudner: Impinger.

The Court: Have you got any in your department?

The Witness: We have not to my knowledge.

The Court: That makes it a little easy for you to estimate dust. Excuse my seeming a little sarcastic. Why haven't you got any impingers?

The Witness: I believe the appropriation is quite high.

The Court: I will get you some. That condition is finished. Hereafter you will have some impingers. It is absurd to inspect for dust without the suitable equipment, isn't it?

The Witness: Not exactly.

[fol. 567] The Court: Well, it would be better done if you had an impinger, wouldn't it?

The Witness: That's right.

The Court: Well, you are going to have some in the future.

Q. Now, Mr. Abbott, you went to the Grasselli plant in 1929. What inspection did you make of this plant in respect of ventilation and dust?

A. Made a general inspection to see that there was not excessive dust in the plant. One of the questions that we must report on in our inspection: "Is there excessive heat, dust or fumes in the plant" which we visit.

Q. And you actually observed the conditions as they are with respect to ventilation and dust?

A. I did.

Q. How many years did you inspect the Grasselli building after 1929? You have one report in 1929.

The Court: There was another one April 28, 1930, August 7, 1930 and March 20, 1934.

Q. What did you do when you made that inspection?

A. Made a complete general inspection of the plant.

Q. What did you find with respect to ventilation and dust conditions?

A. I found nothing that did not comply with our State [fol. 568] regulations at that time.

Q. And do you remember the silicate department or the phosphate department?

A. The silicate department?

Q. Yes, do you remember the department that had the furnaces and that had molten glass?

A. I do.

Q. Do you remember inspecting that?

A. I do.

Q. What were your observations, what did you observe with respect to ventilation and dust conditions in that plant?

A. I found that an exceptionally clean plant; there is no cause to report any violation of the law in that section.

Q. Did you find the air full of dust?

A. I did not.

Q. Did you find the air so full of dust it looked like smoke?

A. I didn't see any of it.

The Court: All your reports under that heading, "Sanitation, ventilation, health conditions" are blank; does that mean they are good?

The Witness: That means there are no violations.
[fol. 569] The Court: There are no violations, that is what I thought.

Q. Did you find any dust on the floor so heavy it was knee-deep?
A. No, I didn't see a fraction of an inch deep, no traces of it.

Mr. Turtur: No trace of it, you said?
The Witness: No large traces of it, not that I could notice, no.

Q. In connection with ventilation what did you observe?
A. In what respect?

The Court: We know from the physical structure of the building what the ventilation was, don't we?
Mr. Rudner: That's right.

Q. Now, you found no violation whatsoever the two years that you examined?
A. None whatsoever, not pertaining to this. There were some machinery violations at one time.
Q. That has nothing to do with this.

Mr. Turtur: I think it does, your Honor. Let him give the date.
The Court: No, he has made the report.

Q. Do you remember the phosphate department?
[fol. 570] A. A great many departments there in that plant; I wouldn't just recall which one was the phosphate.
Q. You haven't been there recently?
A. I did go there recently but to remember the designated department over a period of years I couldn't say exactly which is which there.
Q. The phosphate department has the vats; do you remember the vats containing chemicals, the department containing chemicals?
A. I cannot at this time place them.
Q. Now, did you inspect every department of the plant?
A. I did.
Q. And found all the departments satisfactory with respect to ventilation and dust?
A. I did.

Cross-Examination.

By Mr. Turtur:

Q. How do you know there was no dust there if you don't remember how many buildings there were?

A. There is only one thing to remember about dust, where there is a very large number of buildings, possibly in the neighborhood of 75 or 80 buildings, and I don't believe any man living could, after a period of years, go out and say exactly how many buildings there are at that time, particu- [fol. 571] larly when you are not particularly interested in the number of buildings there, as far as they are concerned numerically.

Q. In how many buildings is this silicate department separated into that have a wall between?

A. I believe there is one large building with one separation, I am not certain of that.

Q. And is there a wall between each furnace?

A. I cannot recall.

Q. When was the last time you were there?

A. I visited that plant some time about two months ago.

Q. And only two months ago you cannot recall whether there were these walls separating the various furnaces?

A. You see, I have six—as I have over six hundred industries that I go into, I cannot remember every separate division of over six hundred.

Q. I see. Now, in view of the six hundred industries that you have to cover you are definite and you are certain and you are positive that during all of your inspections there wasn't even a particle of dust, as you say?

Mr. Rudner: He didn't say that. Now be fair to him.

[fol. 572] Mr. Turtur: I am not through with my question.

Mr. Rudner: Well, you started it unfairly.

Q. Accumulated dust on the floors or elsewhere, is that what you said?

A. I said there was no accumulation of dust at the time of my visit and I have reason to believe that there was none in between times.

Q. Why do you have reason to believe that there was none in between times?

A. Because I have, each case I make a careful inspection of the operation which I go into.

Q. How many furnaces were in the operation only a few months ago when you went there?

A. There was one furnace operation at the time of my visit.

Q. And did you make an inspection as to the dust condition in other furnaces?

Mr. Rudner: Which were out of operation for two or three years?

Mr. Turtur: Please, I am cross-examining.

Mr. Rudner: Let's be fair.

Q. Inasmuch as they were not operating, where they were not operating there would be no dust coming from them and I checked up to that extent.

Q. I see. And in view of the fact that they were not [fol. 573] operating the other furnaces you did not make such a thorough check of the dust condition in and about those furnaces, did you?

A. I made adequate check to ascertain whether or not the conditions were satisfactory.

Q. How long were you in that department?

A. I spent eight hours in that factory that day.

Q. Which factory?

A. In the Grasselli Chemical Company.

Q. In every building?

A. I visited every building on the premises.

Q. And you say there are 75 to 80 buildings on the premises?

A. Well, including, you might say, toilets and out-houses and things of that type.

Q. And how many hours—pardon me—did you say you were there?

A. Eight hours.

Q. And in the whole of the eight hours it took in all of your 75 buildings with a thorough inspection, did you say?

A. It did.

Q. And also the various toilets and other out-houses?

A. I didn't visit every out-house.

[fol. 574] Q. Now, were you in this plant at the time that the furnace was working?

A. I was.

Q. And was there any excessive heat produced?

A. Not what I would designate as excessive heat where the men came directly in contact with it and had to work under that excessive heat.

Q. How far were you from the furnace that was in operation?

A. That I could put my hand on it if I desired.

Q. And one side of the furnace, will you describe it, please, as to the other?

A. On the discharge point there is an opening in the furnace which permitted a liquid to form onto a base which throws a spray of water falling on the molten liquid that was coming out.

Q. And in that molten liquid was that or was that not excessive heat?

A. I wouldn't designate at that point——

The Court: What is the purpose of these questions? You don't contend your client has been injured by excessive heat, do you, Mr. Turtur.?

Mr. Turtur: No, your Honor, I am cross-examining as to the credibility of this witness.

[fol. 575] The Court: Oh, we have had enough of it.

Mr. Turtur: I want to ask—he said that he made an inspection as to excessive heat and dust and fumes and also as to ventilation. Now I want to ask what else he saw as to ventilation.

Q. What was the system of ventilation there?

The Court: Is this time how many years ago, five years, —900 factories? You can't expect him to recall with accuracy the exact details.

Mr. Turtur: But he made a report, your Honor please.

The Court: He made a report at the time he made the inspection.

Mr. Turtur: And some portions of which reports are blank as to some sections.

Mr. Rudner: That shows no violation. The witness has so testified.

Mr. Turtur: How is he able to testify now with relation to those things?

The Court: Be fair on both sides.

Mr. Turtur: I do want to be fair, your Honor please.

The Court: Mr. Abbott, has your department got one of these, do you know (handing witness a slip of paper)?

[fol. 576] The Witness: I have never seen them.

The Court: Make a note of it and you tell Mr. Toohey; he is going to get a letter from me in the meantime—Reprint 28, Board of Public Health Reports, Volume 47, No. 12, describing the impinger, dust sampling apparatus. I think the State of New Jersey can afford to buy you one of those, don't you? If you had one of these, either there wouldn't have been any injury in this case or on the other hand maybe there wouldn't have been any lawsuit, because we would have known the facts more accurately.

Q. Do you know what some of the requirements are with reference to riveting the straight seams where corrugated iron is used?

A. I do not.

The Court: What are you going to do, you are not going to try to examine this inspector on the Factory Act?

Mr. Turtur: This is not the Factory Act, your Honor please.

The Court: Some similar statute?

Mr. Turtur: He is an inspector, your Honor please, of the Department of Labor, and I am looking now at a [fol. 577] book issued by the Department of Labor under Sanitary Engineering and Industrial Standards, page 17, standard specifications for the construction and installation of exhaust system for the removal of industrial dust, noxious fumes, excessive heat, and——.

The Court: By agreement there was no exhaust system in this factory.

Mr. Turtur: Very well, your Honor. Now he refers to the law and refers to how well versed he is with all these other things. I am asking him now how thorough his inspection was of 75 or 80 buildings. I am asking if he knows what the regulations are of the Department.

Q. Do you know what the regulations are of the Department with reference to riveting of all straight seams?

Mr. Rudner: What page are you reading from?

The Court: You mean does he know it from memory?

Mr. Turtur: No, if he knows what the requirements are, not verbatim.

The Court: Are you familiar with that book?

The Witness: I am. I know where I can obtain that information whenever I need it. There is many regula- [fol. 578] tions pertaining to that specific item that I cannot keep the entire thing in my head, but a good engineer knows where to find things when he wants them.

Q. Do you know where the mix room was in this silicate department?

A. I couldn't designate the exact spot, couldn't make you a sketch of it.

Q. Did you make a thorough inspection of that mixing room?

A. I did, I always make a thorough inspection of every building I go into.

Q. All right. Now, in view of the very thorough inspection you made of the mix room will you be so kind as to describe how the corrugated iron used between the mix room and the silicate department is constructed with reference to its seams?

A. All I can say is there was no violation of the law at the time of my visit, as far as I know at this time.

The Court: You are asking, Counsel, for an impossibility.

Mr. Turtur: Your Honor please, he just looked at some pictures before he got on the stand and I am wondering why it was necessary if he made such a thorough inspection——

[fol. 579] The Court: He had how many factories, 900?

The Witness: 600.

The Court: 600, and his inspection was in 1930, six years ago.

Mr. Turtur: And he says he made a thorough inspection.

Q. Did you look at some photographs before you got on this stand?

A. I glanced at some photographs.

Q. Why was it necessary to glance at some photographs if you had been there only two months ago?

A. Because in two months' time I have had over 200 visits since that time covering all types of factories, and you or nobody else could keep that thing in your head.

Q. In spite of the fact——

A. And I won't attempt to do it.

The Court: Do you remember how many factories in the State there are dust conditions that you have to inspect for, in your factories, the ones in your district.

The Witness: I couldn't offhand say just how many there are but I imagine about 10 per cent have dust of some type.

The Court: That's all.

Mr. Turtur: That's all.

[fol. 580] Mr. Rudner: The other inspector, the man who followed Mr. Abbott, is deceased. I want to prove that fact through this young lady.

The Court: I don't suppose you can show his reports.

Mr. Rudner: No, I can't but I just want to show the fact.

The Court: It will be conceded.

Mr. Turtur: How can you prove any fact when he is dead?

Mr. Rudner: I don't want somebody to say, "Why didn't you produce the man?"

The Court: All right, if he is dead he is dead.

Mr. Rudner: Rearwin.

The Court: He made the reports from 1931 to 1935?

Mr. Turtur: What year did he die?

Mr. Rudner: He died in 1934.

The Court: '33 and '34, yes, I am wrong about '35.

Mr. Turtur: According to your Honor's reference, there is no specific reference to the phosphate or soda ash department, referring to the State reports.

[fol. 581] The Court: The reports are in the same form as the others.

Mr. Rudner: These reports cover the whole plant and show no violation with respect to any part of the plant.

Mr. Turtur: May I renew my motion so that Professor Gettler can get away?

Mr. Rudner: It is a short witness.

Mr. Turtur: The other was a short witness too.

The Court: We have to adjourn at four o'clock today. How long is your chemist going to take?

Mr. Rudner: Well, of course I will let him testify first on the chemical features and then cover the rest later on. This will be very short.

The Court: What more we need to know about chemistry after the chemistry school this morning I cannot see.

JAMES E. FELTON, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mr. Felton, where do you live, sir?
A. Rahway, New Jersey.
[fol. 582] Q. And you are Factory Inspector for the State of New Jersey?
A. Yes, sir.
Q. For the Labor Department?
A. Yes, sir.
Q. How long have you been such inspector?
A. Since the first of November, 1933.
Q. During the course of your inspections was the Grasselli Chemical Company plant assigned to you?
A. Yes.
Q. As part of your district?
A. Yes, for a short while.
Q. And when?
A. The exact date I cannot remember but it was shortly after I took over the position in the first of November, 1933.
Q. Do you know when you first made an inspection of the Grasselli plant?
A. I couldn't tell offhand, it is in the records there.

The Court: Is this another inspector?
Mr. Rudner: Yes, this gentleman succeeded Mr. Rearwin.
The Court: Then he must have been after the man left.
Mr. Rudner: I guess that's so.
[fol. 583] The Court: He left in November, 1933. We don't want him. That's all, sir, Mr. Davis.
Mr. Rudner: Of course, Mr. Felton does have one report, March 6, 1934.
The Court: That is after he left.
Mr. Rudner: After he left, yes.

Charles T. Davis, recalled.

Direct examination.

By Mr. Rudner:

Q. Mr. Davis, have you told us all about the chemistry of the situation with respect to the tests made this morning or have you anything to add in the light of what Dr. Gettler has testified?

A. I think there is very little to be added except possibly for emphasis. The general chemical reactions were shown, unless we go into the more theoretical side of the reactions.

The Court: I don't think we want to, if you are looking at me, Mr. Rudner.

Q. Now, Mr. Davis, after you graduated from Harvard College in 1924, was it?

A. Yes.

Q. With a degree of Bachelor of Science and Chemistry——

Mr. Turtur: We have gone into that.

[fol. 584] The Court: You thoroughly qualified Mr. Davis.

Mr. Rudner: No, I am taking it up from that point; I am not qualifying him any more. This gentleman is also Factory Supervisor or Foreman of this department.

The Court: All right, only so Dr. Gettler can go, that's all, if he wants to.

Mr. Rudner: I don't know that we want to keep the Doctor.

Mr. Turtur: I don't know what you are going to ask, I don't want to take any chances.

Q. What was the first work you did with the Grasselli after you came there in 1924?

A. For approximately nine months I was assigned in the control laboratory.

The Court: We had that, I remember that very word "control laboratory."

Q. You were at one time assistant foreman or foreman of the silicate department?

A. I was foreman of the silicate department.

Q. And when did you take on the work of foreman of the silicate department?

A. August 13, 1928.

Q. August 13, 1928?

A. Yes, sir.

[fol. 585] Q. And were you then put in charge of the silicate department as foreman?

A. I was in complete charge of the silicate department.

Q. And were you assigned an office in that department?

A. Yes.

Q. Were you there as foreman when Mr. Matey was employed?

A. I hired Mr. Matey.

Q. And when?

A. Fifth day of December, 1928.

Q. Are you reading from something?

A. Yes, I am refreshing my memory from notes here that I have.

Mr. Turtur: Well, may we have the record, your Honor please?

The Court: Is there any dispute after all these days about when he was hired?

Mr. Turtur: No, but he may be looking at something I don't know anything about and I would like to have the opportunity of looking at them, that's all. If he is going to refer to any records, it is either he knows or he doesn't know.

The Court: Go ahead.

[fol. 586] Q. You say you hired Mr. Matey?

A. Yes, sir.

Q. In what capacity?

A. As a furnace helper.

Q. Now, when Mr. Matey first came there how many furnaces were there?

A. Two.

Q. What numbers were they?

A. 1 and 2.

Q. In what furnace was he placed?

A. Both of them, the furnace helper assisted on both 1 and 2 furnaces.

Q. Now, to get things right, suppose we go to this chart. Can all of you gentlemen see?

A Juror: No, we cannot see anything.

Q. Now, Mr. Davis, would you mind stepping down from the stand, please? You have seen this chart, have you not?

A. Not until it was here.

Q. Pardon me?

A. Not until I saw it here.

Q. Now, just examine it and tell me if it is a correct representation of the silicate department with respect to the mix room, the metasilicate room and the furnace room?

[fol. 587] A. Yes, it looks to me as if it was even to scale; yes, that is a correct representation.

Mr. Rudner: I offer that in evidence.

(Received and marked Exhibit D-1.)

Q. I want you to trace, Mr. Davis, the operation of the manufacture of silicate, going from the beginning, tell what you put in and what comes out.

The Court: We have had it, Mr. Rudner, we have had it. If there is anything you don't understand about the way this plant operates, I would like to know what it is.

Mr. Rudner: Well, if your Honor please, we haven't had it by a person who knows, we have had it too generally by persons who don't know. I should like to get it exactly. The map is plain and I think it would be very helpful all around.

Mr. Turtur: There was a jury inspection, your Honor please, and that is the finest of evidence, just what the jury saw themselves and the foreman explained it while they were there.

The Court: I cannot see the purpose. We have got other things to do, we are busy.

Mr. Rudner: The record will be entirely barren of anything about this department, sir.

The Court: The record, I should say, was replete with it.

[fol. 588] Q. All right. You mix the soda ash and silicate sand in the silicate department?

A. Yes.

Q. And what quantity of each do you mix?

A. The ratios are approximately by weight 2 pounds of sand to 1 pound of soda ash.

Q. Now, is each one of these chemicals in a separate silo?

A. They are.

Q. And they go from the silo into what?

A. They go from the silo—well, the soda ash goes from the silo by means of a pneumatic conveying system to what we call the scale tank where it is weighed.

The Court: Can you show them on the map?

The Witness: They are not located here, sir.

The Court: How do they get into the place——

The Witness: Yes, here it is right here; here is the representation by a circle, there is the scale.

The Court: We are interested, as you know, Mr. Davis, in this soda ash. Now tell us where the soda ash comes into the place where this man worked. That's all that we are concerned about, and in what quantities.

[fol. 589] The Witness: It comes into the furnace room through this overhead conveyor here which is of welded steel construction.

The Court: Pipe?

The Witness: No, it is a large conveyor possibly 7 feet at the base in width and goes up the side for approximately 6 feet and comes to a peak at the top.

The Court: Sort of a chute?

The Witness: Well, it is a belt conveyor.

The Court: A belt conveyor inside?

The Witness: But that is just a housing which is of welded steel construction.

The Court: And the soda ash, of course, is a powder?

The Witness: Yes, somewhat similar to what you saw here this morning.

The Court: That is put on this conveyor?

The Witness: Mixed with the sand first and goes over into this steel conveyor housing into the hoppers right above the furnace.

The Court: Then what happens?

The Witness: From there it is charged into the furnace through a continuous screw conveyor which is adjustable as to speed by a Reeves drive.

[fol. 590] The Court: The man who operates the furnace, I suppose he does that?

The Witness: By turning a handle he changes the speed of the screw.

The Court: Is the soda ash dumped into the furnace through a funnel or what?

The Witness: These screws are encased in solid pipe about 6 inches inside diameter and through the furnace wall through which they project there is a water jacket so that the screw is inside the water jacket and water circulating around the outside of that to keep that cool so that it won't be fused in the screw itself and make that——

The Court: What facilities are there for leakage of this soda ash into the air?

The Witness: The entire system from the mix room to the screw conveyor itself is sealed. You have coming from the hopper down into the screw conveyor a close fit but not absolutely tight; in other words, it has to be a close fit because occasionally the water jacket will spring a leak and let water go into the furnace and these stokers are on wheels or trolleys where they can be brought back quickly to get that jacket out and so the fit is just a slip fit between [fol. 591] the hopper and the screw that feeds the furnace.

The Court: Then when the operator of the furnace operates the screw, is it?

The Witness: Yes, sir, when he pulls it back.

The Court: When he pulls it back and the soda ash comes down there is some opportunity for the soda ash dust to escape in the atmosphere, is that correct?

The Witness: He first closes a damper above it and there is a quart, two quarts of soda ash when he pulls back that may fall to the floor and there will be a small amount of the dust which the rising currents of air into the furnace will take up.

The Court: All right.

By Mr. Rudner:

Q. Now, Mr. Davis, the actual mixing process of the soda ash and sand, where does that take place?

A. That takes place right in this position here.

Q. Marked the mixer room.

A. That's right.

Q. Does the complete mixing take place in that room?

A. The complete mixture takes place there, the only object being to get a uniform mix of sand and soda ash [fol. 592] similar to what you do when you mix concrete; you want to get your sand and cement uniformly mixed.

Q. Now, when the mixture leaves the mix room is it completely mixed with respect to the sand and soda ash?

A. Yes, what we call the homogeneous mixture.

Q. No further mixing after it leaves that point?

A. There is not.

Q. After it leaves that point what is the process, is it the mixed product that is being carried forward?

A. Yes, from that point on you convey to an elevator which in turn places on the belt conveyor and goes over to the furnace hopper.

Q. That is all enclosed.

A. That is.

Q. Now, with respect to the mixer room, what would you say about the dust conditions there at the time Mr. Matey was employed?

A. I would say there was no dust.

The Court: I thought you said it was all enclosed.

The Witness: The apparatus is all enclosed.

The Court: How could there be any dust, how could there possibly be any dust?

The Witness: The only time you get any dust when frequently you have a break-down in the apparatus you have [fol. 593] to open it, and at that time you probably have to shovel some of the material out of the apparatus; you do get a certain amount of dust.

The Court: Was that one of Matey's duties?

The Witness: No, sir.

The Court: Did he have any duties in connection with the mixing room?

The Witness: He never worked in the mix room.

The Court: Then why are we interested in that?

Mr. Rudner: Well, your Honor please, the testimony of Mr. Matey is the dust was flowing out of that mixing room so fast and in such great quantities that I think we have got to explain this step by step.

The Court: Well, the mixing room Mr. Davis just said was sealed.

Mr. Rudner: That is correct, that is what he says, but I am dealing with the testimony of the plaintiff which we have got to contradict; otherwise it stands as admitted.

Q. Now, the mixer room has a separate wall from that of the furnace room, is that correct?

A. It has a partition between itself and the furnace room.

[fol. 594] Q. Made of what?

A. What we call corrugated sheeting.

Q. And is there a door between the mix room and the furnace room?

A. There is.

Q. How does that door operate?

A. It was at one time a sliding door but the repairs became so expensive we took it off of the old barn door, fastened back and forth, and put a regular house door that opens in and out.

Q. And when Mr. Matey was there what sort of a door was there?

A. I think the sliding door was there at that time.

Q. Was it changed while he was there?

A. We changed to that the last few years, I believe.

Q. Now, is there a door leading outside from the mix room?

A. From the mix room there is a double door leading outside in the vicinity of here, somewhere out here (indicating).

Q. Now, are there windows in the mix room?

A. There are.

Q. How many?

A. I don't know offhand, I should hazard a guess of approximately ten.

Mr. Turtur: I object to the guess, if your Honor please.

[fol. 595] The Court: Give your best judgment.

The Witness: To my best judgment, about ten.

Q. Are there any other doors in the mix room?

A. There is a door in the mix room leading over into the silo stair well on the first floor and also the silo stair well on the second floor and there is one leading from the upper section of the mix room, the top floor, out onto the roof of the building, and also one leading from the upper part of the mix room floor to approximately the third level in the silo stair well.

Q. Now, from the mix room are there some pulleys there which operate somewhere?

A. The entire mix room is driven mechanically by a system of line, shafts and belts and these are both within and without the mix room. The motor, main motor, that drives the mix room is back in here—no, I am sorry, it is not, it is here, right in here (indicating).

Q. Is that all electrically driven?

A. This is all driven by electric motors.

Q. Now, these belts, do they lead from the mix room into the furnace room?

[fol. 596] A. Well, from the motor room.

Q. Tell me of the conditions while Mr. Matey was there, please.

A. The conditions today are the same as they were then. We have an electric motor sitting about centrally located in this building here and from the outside right along this wall we have a line shaft, what we call a line shaft, being driven by this motor by means of a belt, and then on this line shaft here there are, I think, four additional pulleys which have other belts on that lead into the mix room to drive such pieces of apparatus as the mixer, the elevator, the soda ash screw and the sand elevator.

Q. Do those belts have any effect upon dust conditions?

A. I don't understand what you mean.

Q. Do they create a dust condition, the belts?

A. If they were allowed to operate any material they would but there is no [illegible] for them to create any such thing.

Q. These are leather belts?

A. Some of them are composition belts, fabricoid belts, regular transmission type of belting.

Q. Can these belts carry any foreign materials outside of the mix room into any other room?

[fol. 597] A. They can if the foreign material is applied to the belt, they will carry it, that is, it is rotating back and forth. Foreign material put on there would, of course, travel with the belt and be thrown off by centrifugal force when it reached the pulley.

Q. Now, Mr. Matey testified something about some boxes being placed over the pulleys sometimes while he was there and I am going to show you a photograph and ask you whether those boxes were there while Mr. Matey was there or some boxes like that.

Mr. Turtur: I object to the reference to the photograph on the ground that we do not know whether that truly represents the condition when Mr. Matey was there.

Mr. Rudner: That is the question, whether it does or doesn't.

Mr. Turtur: And further than that, your Honor please, the jury has also inspected the plant.

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed).

A. It does represent conditions as they have been over [fol. 598] a number of years dating back to the time Mr. Matey was there.

Mr. Rudner: I offer this in evidence.
Mr. Turtur: Objected to.

(Received and marked Exhibit D-2.)

Q. I want you to hold this in your hand, face the jury and tell us how those boxes came to be placed there and when.
A. Well, inside——

The Court: Did Matey contend there was some dust from them?
Mr. Rudner: Yes, sir.
The Court: Let me see his testimony to that effect, let me see the picture, please. What are these boxes, Mr. Davis?
The Witness: In each one of these is a pulley and belt.
The Court: In what room was that?
The Witness: In the furnace room, this No. 1 furnace.
The Court: What is in them besides the pulley and belt?
The Witness: Nothing.
The Court: You mean there is no material?
The Witness: Yes, there does exist a material there occa-[fol. 599] sionally.
The Court: What sort of material?
The Witness: The operators in the mix room have concocted a rather unique belt dressing consisting of fuel oil, sand and ashes, which they apply to those belts to make them hold. In other words, the original construction of this room, these belts were operating on a lower burden than they are now and they are pretty well up on their limit of capacity at the present time and they use this dressing, as they call it, on those belts which makes it carry ahead and it comes down and falls in these houses and we have those houses there so that the oil, the fuel oil won't create a fire hazard or slipping hazard, falling down on the floor.
The Court: Was any soda ash used on these belts?

The Witness: I have seen a mixture of soda ash in times past but not in recent years on the belts because it has a destructive effect.

The Court: I thought you said your employees used this mixture.

The Witness: They do not but in Mr. Matey's time about ten years ago they used to use soda ash to dry the wet [fol. 600] belt. If the belt was rained on through a leaky roof soda ash was used to make it dry.

The Court: Then, Mr. Matey, you think his recollection is inaccurate on that?

The Witness: I do, sir.

By Mr. Rudner:

Q. Now, did you tell us why the boxes were originally put there?

A. Put there for two purposes, one as a safeguard in case a belt breaks it will not fall or be thrown into the aisleway below and catch a man and injure him; then also with the use of this concocted mixture of fuel oil, sand and ashes which we put on the belt it will not fall to the floor here and cause a slipping or fire hazard.

Q. Were these boxes put there at all because of anything Mr. Matey told you about dust?

A. No, they were there before he came.

The Court: He didn't claim that, did he?

Mr. Rudner: Pardon me?

The Court: Did he claim they were put there because of dust?

Mr. Rudner: Yes.

The Court: Where did he claim that?

Mr. Rudner: That is just one spot.

[fol. 601] Mr. Turtur: Did your Honor look at page 15 of the testimony, was that what it was? What page, Mr. Rudner?

Mr. Rudner: Page 15.

Mr. Turtur: That doesn't show it.

The Court: He said "Us three boys comes one morning and we told Mr. Davis that these pulleys make a lot of dust, we have three or four inches every morning on this side of the wall. He says he cover up those pulleys and he did."

—. When did you cover them up in fact?

The Witness: They were covered before I entered the department.

The Court: When you came there?

The Witness: Yes.

The Court: You could easily prove that, couldn't you, from the records?

The Witness: I imagine that we could; it would be quite a job to get all the records together for that.

The Court: See if you can do it.

Q. Do you remember any conversation with Mr. Matey with respect to those boxes that have any relation to dust?

A. I do not, sir.

Q. Now, when Mr. Matey came first as assistant furnace man to work there for a couple of weeks, I take it——

[fol. 602] A. May I refer to this brief here to refresh my memory?

The Court: What are these taken from?

The Witness: They are taken from records such as time sheets, to show what jobs he was on and when.

The Court: Is there any dispute about that still? I mean, if there is let's have his testimony and correct it or contradict it.

Mr. Rudner: I think there are disputes as to some dates.

The Court: Name the dates.

Mr. Rudner: As to the time when the metasilicate department was opened, there is a dispute as to that. I will try to avoid it as much as possible.

Q. Now, Mr. Matey worked in No. 1 and No. 2 furnaces before No. 3 furnace was installed. Just give us the ordinary routine of Mr. Matey in the course of a day.

A. By referring to this chart I believe I can give it better.

Q. Now we are dealing with only No. 1 and No. 2 furnaces.

A. No. 1 and No. 2 furnace, that's correct. When these two furnaces were operating, which they were during [fol. 603] a good bit of Mr. Matey's employ, we had operating on each furnace what we called a furnace man and a helper. These furnaces at that time were operated on what we called producer gas, the gas producers being back here which were operated by other men than Matey. The furnace man's duties—and of course at all times he was assisted by the furnace helper which Matey was at one time, for a period of breaking in, I believe it is approximately three weeks he was a helper before he advanced to furnace man—at this position there is valves; in other words, these furnaces are of an open hearth construction, very similar to open hearth steel furnaces, what we called the regenerator type at one time; you have producer gas and air coming through this way combusting within the tank proper and then exhausting through the other side of the furnace. You would operate in that manner for approximately 20 to 30 minutes and then you would reverse and have the gas and air coming in this direction and going out here (indicating). Each one of these chambers on the side of the furnaces is filled with nothing but a cross-work or a checker work, as we'll call it, of a good fire brick, which is laid in cross fashion just exactly as in checker work, and the function of that checker work is to absorb the heat when the combusted gases are going out, [fol. 604] so that when you have the uncombusted air and gas coming in it preheats that. In other words, it permits you to have a higher temperature of combustion within the combustion chamber and these valves, one on air and one on gas, had to be thrown in the reverse position, as I said, every 20 or 30 minutes, depending upon the condition of the furnace inside, which you would know by looking through the observation ports through a blue glass. So he and his helper would throw these two ports to give the furnace charge the proper heat. We call it throwing them. We reverse them. After the furnace is charged it had a cycle of four hours. They would throw these dampers, keep watching the charge until the entire charge was molten and in a fused condition which would permit of it being tapped, as we say. Then they would go around the opposite side of the platform and remove the clay plug in the tap hole and permit the fluid glass to run down and shoot into these granulators. This granulator is a revolving steel drum that had a spray of water entering it. That spray of water was to take the molten and fused glass, cool it and at the same time granulate it or break it up into granules approximately ½ to 1 inch in diameter. The rotating effect of the granulator is to convey the material in the granulator, the hot glass, up these little in- [fol. 605] clined things here and at the same time hold the water back in the granulator and the glass would be discharged into what we call a buggy or a tram car. So they would watch the tapping of this furnace and when the buggy was full it would be pushed onto an elevator here and hoisted to the floor above. Usually you got from 3 to 4 buggies from a furnace; No. 2 furnace being the larger, gave about 4 buggies of glass per charge and No. 1 furnace about 3. These buggies would be taken to the second floor and there dumped into what we call an autoclave which you can see in these two positions. We had two autoclaves and two furnaces. From the second floor we merely had a steel hopper which the tram buggy was tilted over and the glass would fall into that steel hopper down into this manhole. The function of the autoclaves was to dissolve this glass under approximately 60 pounds steam pressure and convert the silicate glass into the solution. They also were charged with hot water and naturally, when you admit that hot glass into that hot water, you would get some rising piles of steam. After emptying the buggies the buggies again must be brought down by means of the elevator and pushed beneath these granulators to be ready for the next furnace charge.

[fol. 606] The Court: How many charges a day?

The Witness: These two furnaces are a batch proposition, six charges per day, the cycle being four hours.

A. (Continuing.) He would then have to go to the back of the furnace here and start his stokers, which are treated very much in the same manner, that is, on No. 3, in order to put a fresh charge of soda ash and sand in the furnace——

The Court: How many in each furnace?

The Witness: Six in each furnace in a four hour cycle.

The Court: Twenty-four hours a day, one man only works eight.

The Witness: That's right.

The Court: How many charges did each man have?

The Witness: He would average two from each furnace per day. That sand and soda ash would be charged into the furnace for a period of approximately an hour and a half, during which time he would occasionally look at the furnace to find out the amount which was in there, always throwing his dampers to reverse his flow of gas and air every twenty——

[fol. 607] The Court: How many pounds of soda ash in each charge?

The Witness: A charge on this small furnace would consist of approximately 10,000 pounds of sand and 5,000 pounds of soda ash. Actually it is 9775 pounds of sand and the amount of soda ash would vary from 5,000 to 5,200. In order to keep our control of the quality of product we would lower it or raise it in order to get the control of the quality. The No. 2 furnace had roughly 30 per cent greater capacity than No. 1. After charging this furnace for approximately an hour and a half you would cease charging to permit the material in the furnace to fuse down. After it had fused down for a half an hour you would again charge for a period varying from a half hour to an hour and then shut off your stokers and wait for the final mass to become liquid enough to flow out of the tap hole. During the intermission of all this work between times of course the men had the regular duty of keeping their place clean, effecting repairs of a very minor nature, cleaning up the glass that may have been spilled while this granulator was discharging, and in general [fol. 608] maintaining the department, even going to painting some of the apparatus.

Q. Now, when Mr. Matey worked in No. 1 and No. 2 furnaces were the conveyors in the mix room to the hoppers of Nos. 1 and 2 furnaces also enclosed?

A. Yes. The time we constructed No. 3 furnace we merely lengthened out that conveyor and built another room to house No. 3 furnace.

Q. Was the general system of conveying the same then as it is now with respect to No. 3 furnace?

A. It was the same.

Q. Now, about what percentage of the time in the course of a day did Mr. Matey work behind the furnace, in connection with No. 1 and No. 2 furnaces now?

A. I would estimate the time spent on this section of the——

The Court: Well, the only time he would be exposed to dust would be when the furnace was being charged, isn't that so?

The Witness: He is not necessarily exposed to dust even at that time unless something should occur that there would be dust there.

The Court: I mean there is no dust that comes out of a molten furnace?

The Witness: No, sir.

Mr. Turtur: The molten furnace comes out on the other [fol. 609] side. It is not so continuous.

The Court: It wasn't continuous, it took place twice a day.

A. These furnaces were banked furnaces, four hour cycle.

The Court: Twice a day there was a pouring in of silicate and sand and soda ash?

A. (Continuing.) The times which he would spend back on his charging floor position here where they were charging, I would say would be about 15 to 20 per cent of his day.

Q. That is 15 or 20 per cent of the whole day?

A. Of the whole day that he works there.

Q. Not continuously?

A. No. Most of his time——

Q. How else would he devote his time during the course of an eight hour day?

A. The actual discharge time of this furnace in No. 1 was from 45 minutes to an hour and in the case of No. 2 from an hour to an hour and a half, during which time he must be on the discharging end to receive the glass. That time varies according to the temperature of the silicate glass. Ordinarily your glass is in a barely molten state at 1900 degrees Fahrenheit or 2200 degrees Fahrenheit; [fol. 610] it is quite liquid, and if you get it to twenty-four it will run almost like water.

Mr. Turtur: Pardon me, I didn't get what he was subjected to.

Mr. Rudner: 1900 or 2200.

A. (Continuing.) The glass itself would be and is between twenty-one and twenty-two hundred degrees Fahrenheit.

Q. How about the furnace?

A. The furnace itself, of course there are spots in the furnace where you get your direct combustion, your flame temperature may run just short of three thousand. Of course, that is in the very centralized position and it is within the furnace proper.

Q. Now you have him working between 15 and 20 per cent of an eight hour day in back of the furnace off and on.

A. That's right.

Q. How else does he devote his time with respect to when he worked in No. 1 and No. 2 furnaces?

A. I would say——

Mr. Turtur: He has given that only a moment ago, your Honor.

A. 60 per cent——

The Court: Yes, he has given it.

[fol. 611] Mr. Turtur: He has already answered that, Mr. Rudner.

Mr. Rudner: I thought, your Honor, he just gave what he did in the course of a day but I just want the percentage of time that he worked these various spots during the course of the day.

The Court: I have asked him how long did the charging take.

The Witness: The charging of the furnace was taken in two steps and over the whole period would be about half of the furnace cycle of four hours or two hours was taken in charging. Of course, he wasn't there all the time it was charging, he merely put on the power and that's all there was to it.

The Court: How long did the flow of soda ash into the furnace take?

The Witness: About two hours over a four hour cycle.

Q. Where the flow was taking place, where would he be?

A. He would generally or most of the time be at this end of the furnace. Of course, he would come back to this end occasionally to throw a damper, merely get hold of a big rod and give it a push over and another one likewise there [fol. 612] (indicating).

The Court: We will adjourn until ten-thirty.

Mr. Turtur: I understand that the representation of Mr. Rudner now is that you will ask nothing further on the question of chemicals.

Mr. Rudner: I don't see how, I don't expect to.

The Court: Better bring your doctors tomorrow.

Mr. Rudner: I cannot get them all.

The Court: Well, you will have to get them all. You cannot prolong this case indefinitely. I am opposed to it.

Mr. Rudner: This witness will take some time.

The Court: No, I want your doctors tomorrow.

(At this point an adjournment was taken to Wednesday, June 17, 1936, at 10:30 A. M.)

[fol. 613] Wednesday, June 17, 1936.

Case continued.

Appearances as before.

The Court: Go ahead. Call your doctors, Mr. Rudner.

Mr. Rudner: Yes.

The Court: I think it would be a good idea to put them on as fast as we can, because the doctors are so busy it is inconvenient for them.

Mr. Rudner: Your Honor wants me to withdraw Mr. Davis?

The Court: Yes, put your doctors on.

Mr. Rudner: Yesterday, your Honor, I filed an answer to the amended complaint pursuant to your Honor's instructions.

The Court: Right.

Mr. Rudner: I just have a few witnesses preliminary to the medical testimony.

Bessie Hall, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mrs. Hall, where do you reside?

A. 15 Gesser Street, Elizabeth.

Q. And are you a graduate nurse?

A. Graduate registered nurse.

[fol. 614] Q. And have been how long?

A. Twenty years.

Q. Now, in January, 1928, were you employed as a graduate nurse by the Grasselli Chemical Company, Grasselli, New Jersey?

A. I was.

Q. And during that month were you so employed?

A. Yes.

Q. I show you this card, record card, which is the record card of George Matey, and direct your attention to the reverse side thereof, with respect particularly to the top line, and ask you whether that is in your handwriting.

A. It is.

Mr. Turtur: I object to the record, your Honor please, unless it is previously proven.

Mr. Rudner: I am only going to prove one line by this lady as being in her handwriting.

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. That is my handwriting.

Q. Now tell me what that first line—read it to me first, and tell me what it means.

[fol. 615] Mr. Turtur: I object, your Honor, as to what it means.

Q. All right, tell me what it is.

A. The man was examined 12/4/28, and his height was 5 feet, 3½ inches, weight 135 pounds.

Q. That is all in your handwriting.

A Juror: Your Honor, I didn't hear the reply to the previous question.

(Previous question and answer repeated by the reporter.)

Q. Do you know what this card is?

A. That is a physical record made out in the hospital on the back of the employment card, made out in the employment department.

Q. And of what person?

A. George Matey.

Q. Was that weight of 135 pounds taken in your presence?

A. Yes, I took it.

Q. That's all.

Cross-examination.

By Mr. Turtur:

Q. You weighed him, Mrs. Hall?

A. Yes, I did.

Q. And you made the memorandum, the entry at the time that you weighed him?

A. Yes, not the time, the date.

[fol. 616] Q. That's all,—by the way, Mrs. Hall, I want to ask you a question. Did you assist Dr. Hazeltine, as such nurse while he was at the plant?

A. Yes.

Q. And for how many years?

A. I assisted Dr. Hazeltine for the length of time that he was there.

Q. And after Dr. Hazeltine left the plant, then Dr. McCallion succeeded him as the plant physician, isn't that so?

A. He did.

Henry H. Kessler, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Doctor, you are a licensed and practicing physician of the State of New Jersey?

A. I am.

Q. Have been such for how long?

A. Sixteen years.

Q. Of what medical college are you a graduate?

A. Cornell University.

Q. What year?

A. 1919.

Q. And do you practice in Newark?

A. Yes.

[fol. 617] Q. Engaged in the general practice of medicine?

A. No, orthopedic surgery and industrial surgery.

Q. Doctor, did you know George Matey?

A. Yes.

Q. When did you meet him medically?

A. On March 12, 1934, at my office.

Q. What date?

A. March 12, 1934.

Q. And in what connection did you meet him?

A. He was sent to me by the Grasselli Chemical Company.

Q. For what purpose?

A. For examination of his wrist.

Q. Now, Doctor, are you in anywise connected with the Grasselli Chemical Company?

A. No.

Q. Are you the plant physician?

A. No.

Q. Have you ever been plant physician?

A. No.

Q. Have you ever been in any capacity employed on regular terms with the Grasselli Chemical Company?

A. I have never been regularly employed by the Grasselli Chemical Company.

Q. Now, did you have a talk with George Matey at that time?

A. Yes.

[fol. 618] Q. What did you ask him; what did he tell you?

A. A history of his condition.

Mr. Turtur: Well, I object to it, your Honor please. He is not the attending physician in this case, nor is he an examining physician in this case.

The Court: You are not seriously contending that an admission is inadmissible, are you?

Mr. Turtur: No, I am not seriously contending that, but he asked him for a history, your Honor please, and this gentleman cannot give a history, because he is not the attending physician.

Mr. Rudner: Well, if your Honor please, counsel has the reverse side of the proposition.

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. What did he come to you for?

A. For an injury to his wrist.

Q. And did you ask him any questions?

A. I did.

Q. And what did he say?

A. He volunteered the information that he had been sick since July, 1931, and that for 19 months prior to the date he came to me he had had skin trouble, and that the two [fol. 619] conditions from which he was suffering at that time were severe itch and this disability to his left wrist.

Q. Did he tell you anything about having a cough at any time?

A. No.

Q. Did he make any statement with relation to any chest condition or lung condition?

A. No.

Q. Did he say to you anything about having been sick and inhaling dust?

Mr. Turtur: I object to this. It is exceedingly leading.

The Court: Sustained.

Mr. Rudner: What is your Honor's ruling?

The Court: Sustained.

Q. Did he make any other complaints to you, Doctor?

A. He had only two complaints—skin trouble, dating back 19 months prior to the date I examined him, and an injury to his left wrist, which he sustained in the summer of 1933.

Q. That's all he told you?

A. Yes.

Q. That's all.

The Court: Did you examine his itch?

The Witness: No.

The Court: Was it apparent?

The Witness: There was nothing apparent grossly on his [fol. 620] arm. That was the only part of his body I examined.

The Court: He didn't tell you where it was, did he?

The Witness: No.

Cross-examination.

By Mr. Turtur:

Q. You were mainly interested, Doctor, in the examination of the wrist that he had been sent to you for, isn't that so?

A. Yes.

Harold A. Tarrant, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Doctor, are you a practicing physician?

A. Yes, sir.

Q. And a graduate of what medical college?

A. College of Physicians and Surgeons, Boston.

Q. And what year?

A. 1931.

Q. Doctor, were you at one time employed as plant physician at the Grasselli Chemical Company in Grasselli?

A. I was, sir.

Q. When was that?

A. Between 1932 and 1934, July.

[fol. 621] Q. Do you remember George Matey who was then employed by the company?

A. I do, sir.

Q. Did you make an examination of him in October, 1933?

A. Yes, sir, I did.

Q. That card which I have just given you, is that all in your handwriting?

A. Yes, sir.

Q. And that represents what with respect to a physical examination?

A. That represents a complete physical examination done on the above named employe under date of October 30, 1933.

Q. Was an examination made at that time?

A. Yes, sir.

Q. Was that a complete physical examination?

A. This is a very complete examination.

Q. Are all the entries in that card which you hold in your hand made in your own handwriting?

A. They are, sir.

Q. Tell me the weight of Mr. Matey on the date of that examination.

A. 130¾ pounds.

Q. Did you examine his chest?

A. I did, sir.

[fol. 622] Mr. Turtur: I object to this, sir. I think the Doctor ought to state what he did without Mr. Rudner telling him what he wants him to say.

The Court: Yes, state what you did, Doctor.

A. This man was sent to me on this date, and I gave him a very complete physical examination, with a very comprehensive history.

The Court: How did you happen to see him?

The Witness: How did I happen to see him? At this time employment in his department was becoming rather scarce, and they were going to have a lay-off, and this man had been under treatment up until this time at the plant hospital.

The Court: For what?

The Witness: For a skin condition; and as our usual practice was, anybody who had been under——

Mr. Turtur; I object to the practice, your Honor please. Your Honor is asking him as to Matey, please.

The Court: Yes.

The Witness; As was the usual set-up in the plant——

Mr. Turtur: I object to that.

The Court: Just tell what happened.

[fol. 623] The Witness: This man was examined purely to ascertain his present physical status prior to discharging him from the plant due to lack of employment. Do you want me to go into great detail?

The Court: Yes.

The Witness: At the time of the examination this man gave a family history. Do you want this in great detail; how much detail?

The Court: Go ahead.

Q. Tell us what you have there, that's what we want.

A. The family history was essentially negative as far as illnesses were concerned, it was essentially negative. He was asked about his health at that time, and he said it was about fair, and he said he had been vaccinated in 1900; his appetite varied; he had no dizziness; bowels regular; no fainting. He was asked about his digestion; said he ate almost everything; apparently normal. He was asked whether he had any complaints at this time and he said that he had some difficulty in sleeping, which we call insomnia.

Mr. Turtur: What was that, he had some difficulty in sleeping?

The Witness: He had some difficulty in sleeping, which we call insomnia.

A. (Continuing.) And he thought this was due to gen- [fol. 624] eral body itching, which we term pruritis; I have here, "He thought it was worse at night. That was the reason he attributed his loss of sleep, and that this condition was aggravated by excessive perspiration, sweating." He also had some itching in his anal region, which would be in his rectal area, and he said that he had a few areas which he termed a rash on his body, particularly underneath the arm pits, in the axillas and around the anal region, which would be the rectal region. Now the physical examination—his general appearance was somewhat pale. He was a good, muscular developed male; as I said, his today's weight at that time, it was 130¾ pounds, and his height 5 feet, 4¼ inches. His temperature at 11:30 in the morning, 98.2, which is essentially normal; his skin,—he was examined very, very carefully,—this patient was stripped,—he had a rash present in both axillas, which would be underneath the arms, and around his anal region. His vision, which was taken by the nurse and is in her handwriting here——

Mr. Turtur: I object to that, your Honor please.

The Court: We are not interested in his eyesight.

A. (Continuing.) His eyes were examined. They were perfectly normal. His ears were perfectly normal.

Mr. Turtur: Well, your Honor——

[fol. 625] The Court: Never mind, it is not worth it.

A. (Continuing.) Nose and throat, submerged tonsils not very visible, and he had an old blue scar——

Q. Were what?

A. Not very visible. In other words, submerged type. He had an old scar over the bridge of his nose. His ear canals were examined; they were perfectly normal. His teeth were in poor condition, and they had a worn appearance. He had no swelling in his neck, in the glands of his neck, and apparently his thyroid gland was perfectly normal. His lungs, inspiration, we usually take the measurements of the chest, and they were 37.75 and expiration 34.75. That would give 3 inches expansion, which is perfectly normal. They were clear throughout, both lungs. There were no rales, and the percussion, which is tapping over the chest, was perfectly normal. His pulse was 62, and it was regular. His blood pressure was 110 over 74, which is within normal limits. His heart was perfectly normal. He had no murmurs, and the muscle tone was perfectly normal and the sounds were somewhat distant. His abdomen was muscular type. There was essentially nothing there. His liver and spleen were not palpable. Under extremities, he had a partial amputation of his right small toe, otherwise perfectly normal. He attributed this to an injury sustained during the world war. I have a [fol. 626] notation here his reflexes were hyperactive. He denied any venereal history.

Mr. Turtur: Hyperactive, that means exaggerated, isn't that so?

The Witness: Slightly exaggerated, that's right.

A. (Continuing.) And his Romberg test, which is determined by placing the patient standing up and closing his eyes, and it was perfectly normal and negative. He had no tremors of the extended hands. His posture was erect. His inguinal region, he had a right ring relaxed, with a slight impulse. He had the potentialities there of a right hernia, and otherwise it was negative. Urinalysis done at this time was essentially negative for albumen and sugar. He had one other test done, which is the Wasserman test, a blood test, and there is a notation here that that is negative. That is all that is on this.

Q. Did you, Doctor, ask him with respect to any complaints that he had as regards health?

A. Absolutely, sir.

Q. What did he tell you in that connection?

A. He just purely said that he had this insomnia and this itchiness of the body.

Q. Anything about a cough for a year or more?

A. Nothing.

Q. Anything about losing weight?

[fol. 627] A. Absolutely not.

Q. Have you given us the whole picture, Doctor?

A. I have given it to you as it existed.

The Court: What did you diagnose the rest as, Doctor? Does that appear?

The Witness: This doesn't appear on this card.

The Court: Do you remember of your own recollection?

The Witness: Yes. At this time he had a condition which we felt was personal in nature, and it was secondary, in all probability, to a fungus infection, which is very similar to athlete's foot. It was present in the axillas, as it can be in most any part of the body.

The Court: You mean you diagnosed his rash as that?

The Witness: Yes.

Mr. Rudner: I am going to have a second doctor here this afternoon.

The Court: All right, that's all. Cross-examine.

Cross-examination.

By Mr. Turtur:

Q. Now, Doctor——

Mr. Rudner: Just a moment. That's all—go ahead.

[fol. 628] Q. Where do you practice now, Doctor?

A. I am practicing in Wilmington, Delaware, at the Du Pont Company.

Q. And ~~you were~~ then with the Du Pont Company when you examined George Matey?

A. Yes, sir; Grasselli was a subsidiary of the company, yes, sir.

Q. And it still is?

A. And it still is.

Q. As such physician for the Du Pont Company, you came down to examine these people at the Grasselli Company plant?

A. No, sir, I was plant physician there at the time.

Q. Oh, I beg your pardon.

A. I was full time physician.

Q. Yes, and, Doctor, do you recall George Matey telling you further, please, that he had not only this skin rash, but he had difficulty in breathing, and also pain over the right chest region, over the right lung, and also in the back region over the right lung; and do you remember his telling you——

(The reporter: Did he answer that?)

The Witness: I didn't know whether you wanted me to answer separately.

Q. Answer it separately.

[fol. 629] A. George Matey all during the time I had him under my care made absolutely no mention of any cough or pains, either in the anterior chest or posterior. This would be anterior and this would be posterior (indicating).

Q. He made absolutely no complaints about any cough?

A. He absolutely did not, sir.

Q. Now during the time that you were there did you treat any other patients for a skin condition?

Mr. Rudner: Objected to as entirely irrelevant and immaterial, not proper cross-examination.

The Court: Sustained.

Mr. Turtur: He said, your Honor, that the condition was a fungus. I wanted to find out whether any other people had a fungus condition.

The Court: That is not relevant to this case. I sustain the objection.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Now, Doctor, did you put down everything in that card that George Matey told you?

A. Yes, sir.

Q. Or did you just listen?

A. I put down everything he told me, yes, sir.

Q. Everything?

[fol. 630] A. Yes, sir.

Q. And the complete examination revealed that he had this condition oozing out from underneath his arms, is that so?

A. Yes, sir.

Q. And he had been subjected to treatments for this skin condition at the plant since 1931, isn't that so?

A. For this condition that he had at present?

Q. For the rash condition, the dermatitis?

A. He had apparently two skin conditions. He had had a condition that was what we recognize as an occupational condition due to some alkali irritation of the skin, but this——

Q. What was that now? He had an alkali irritation of the skin?

A. Yes, sir.

Q. And when did that alkali irritation of the skin come, do you know?

A. Well, he had that at the time when I first came to the plant, sir.

Q. You came to the plant when?

A. I would have to have my other cards here—I came in July, 1932.

Q. And are you the gentleman that diagnosed the condition as dermatitis, and which he received compensation for?

[fol. 631] A. He was already diagnosed when I came there.

Q. As dermatitis?

A. As dermatitis.

Q. And what is dermatitis?

A. Dermatitis is an inflammation of the skin, which is the covering of the body.

Q. And that inflammation of the skin, resulting from an alkali irritation, that is not a fungus group, is it?

A. Well, he had both, you see, as I just tried to point out, he had fungus——

Q. Will you please answer my question?

Mr. Rudner: He is answering you.

Q. I asked you, Doctor——

Mr. Rudner: Now, I suppose——

Mr. Turtur: Will you please let me finish my question?

Mr. Rudner: I ask that the witness be permitted to answer the first question.

Mr. Turtur: My question, your Honor——

The Court: I heard it. He was trying to answer.

Mr. Turtur: But he was trying to give me something further than what the question was.

Mr. Rudner: The question was——

The Court: I heard the question.

[fol. 632] (Question repeated by the reporter.)

A. He had fungus infection involving the axillas under the arm pits and around the anal region, which was not industrial in origin at all.

Q. Then the irritation from the alkali, that was industrial in origin, wasn't it?

A. Yes.

Q. And that was due to some irritating substance to the skin, that's so, isn't it?

A. Yes.

Q. And, Doctor, from your experience, anything that is irritating to the skin is also irritating to the mucous membrane of the person, isn't that so?

A. It is possible it could be. It wasn't in this case, sir.

Q. It is also probable, isn't it?

A. A hypothetical case, yes.

Q. And of course the mucous membrane also refers to the ultimate lung, isn't that so, in breathing?

Mr. Rudner: If your Honor please——

A. I have said very distinctly——

Mr. Rudner: Just a moment, please. There is no proof in this case of any irritation of the mucous membrane, or any of that sort of thing. Counsel is going far afield in cross-examination, particularly with regard to matters not [fol. 633] part of the proof in this case, even in plaintiff's case.

The Court: You are objecting?

Mr. Rudner: Yes.

The Court: Objection sustained.

Q. The prior health to his employment at the Grasselli Chemical Company plant was good, isn't that so, according to your record?

A. This isn't the original examination, sir; this is purely a discharge examination.

Q. Yes, the history, sir, that you referred to, was that the family history was negative; isn't that so?

A. That is true.

Q. And the prior health was also good?

A. Yes.

Q. Now, he told you, Doctor, that he had difficulty in sleeping?

A. Yes, sir.

Q. What else did he tell you besides the difficulty he was having in sleeping?

A. He merely said that this he felt—it was worse at night, and secondary to the skin condition which was aggravated by excessive perspiration.

Q. Night sweats?

A. No, sir. Apparently being in bed and covered up, the average person will have a little excess perspiration, and [fol. 634] anybody can easily realize that will irritate any skin affair that he might have.

Q. You said here, under general appearance, that there was some pallor; that is so?

A. Yes, sir.

Mr. Rudner: He testified to that effect, he so testified.

The Court: Counsel, the function of cross-examination, as you must know by this time, is not to get the witness to repeat everything he said on direct examination. The jury doesn't want to hear it twice.

Mr. Turtur: I know the function of it, your Honor please. I appreciate your Honor telling me, but I am trying to lay a foundation for my cross-examination, your Honor please.

The Court: Well, it doesn't assist in getting the witness to repeat his direct examination. The jury is not interested in hearing it twice. I think they took it in the first time.

Mr. Turtur: Yes, your Honor.

Q. You didn't put anything down on this card as to what the rash was due to, did you?

A. I have that on my other card, sir.

Q. This is not the complete record then?

A. This is the complete record of his examination at that [fol. 635] time.

Q. But you didn't put that down here?

A. No, sir.

Q. Why wasn't it put down here?

A. It is on his other card, sir, on his treatment card.

The Court: Have you got that?

The Witness: They are right out there.

The Court: Well, get them. What do they show, Doctor?

The Witness: These are the treatment cards, your Honor, that we keep daily in our plant hospital. They are purely dictations of the doctor in charge, written in the nurse's handwriting.

The Court: Let me see them, will you?

The Witness: On these cards.

Mr. Rudner: They are by another doctor whom we are going to call.

The Court: Oh, another doctor.

Mr. Rudner: Yes, we are going to call him.

The Witness: They are mixed, they are doctors and nurses.

The Court: All right.

Q. What are the exaggerated reflexes due to, Doctor?

A. Exaggerated reflexes can be anything from nervousness at the time of the examination to what we call as a [fol. 636] highly nervous patient all the time. They generally indicate that a person is rather nervous, and of course, if they were taken over a period of time they might indicate something, but one examination with the absence of other neurological findings there, they don't necessarily mean anything.

Q. Other neurological findings do not necessarily mean anything?

A. No, I say in the absence—as you see there, there is the Romberg test that was done.

Q. And the reflexes that were exaggerated, what part of the body was that?

A. Knee reflex, patella reflex.

Q. And that merely indicates a nervousness?

A. Yes, sir.

Q. Can a skin condition over a period of years produce that effect?

A. I personally don't think that that was secondary to the skin condition at all, sir.

Q. You don't think so?

A. No, sir.

Q. In your handwriting here, Doctor, I see G C C, five years. What does that mean?

A. Grasselli Chemical Company, five years service.

Q. Metasilicate three and one-half years. That is in your handwriting?

A. Yes, sir.

[fol. 637] Q. And phosphate.

A. Phosphate department.

Q. Phosphate department?

A. Yes, sir.

Q. Less than a year?

A. Apparently so.

Q. Did you know, Doctor, that he was going to be discharged before his examination?

Mr. Rudner: He what?

(Question repeated by the reporter.)

Mr. Rudner: Now, your Honor please, plaintiff's own testimony is that he quit. That is a very improper question.

The Court: Sustained.

Mr. Turtur: He said, your Honor please, that he was making this examination for the purpose of seeing whether or not they were going to discharge certain people because there was a lull in the work.

Mr. Rudner: This was a routine examination, which counsel wouldn't permit the witness to testify to.

Mr. Turtur: Well, according to this, I am not allowed to cross-examine, merely because Mr. Rudner brought out his points and I cannot bring out what I want with reference [fol. 638] to cross-examination.

Mr. Rudner: Don't complain of the court's ruling.

Mr. Turtur: I am not complaining of the court's ruling, I am complaining——

The Court: Sustained.

Mr. Turtur: —of the interruption on the part of counsel when I ask the questions.

The Court: I cannot control other people.

Mr. Turtur: Does your Honor sustain the objection?

The Court: Yes.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Now how long did this examination take?

A. That type of examination takes anywhere from 40 minutes to an hour.

Q. Well, I didn't ask you that type of examination, Doctor, I asked you how long did this particular examination take?

A. Approximately one hour, sir.

Q. This particular examination took one hour?

A. Yes, sir.

Q. And you remember that distinctly?

[fol. 639] A. I remember this fellow very, very, very well, sir. I remember this examination.

Q. You do. What was there about this fellow that you remember him so very, very, very well?

A. I took a very keen interest in this man all during the period of time I was at the Grasselli Chemical Company. I knew him by his first name, and would know him any time, any place. I remember the case very, very well, sir.

Q. Why did you take such an interest in the man?

A. I take a keen interest in all my patients.

Q. I didn't ask you that. I said in this particular man.

A. Because I was very much interested in his skin condition, sir.

Q. Yes, and that skin condition was the thing that he kept complaining to you about, isn't that so, while he was under your treatment?

A. Yes, sir.

Q: Yes, and that was more than once or twice, wasn't it?

A. Yes.

Q. It was a lot of times?

A. Yes, sir.

Q. How many people did you examine for this skin condition?

[fol. 640] Mr. Rudner: Objected to, incompetent, irrelevant and immaterial, not proper cross-examination.

The Court: Sustained.

Q. How many people, Doctor, have you examined since you examined George Matey?

A. How many have I examined?

Q. Yes.

A. I have been in the Wilmington office about two years now. That would be about three years ago. We examine on the average anywhere——

Q. Not we, you, Doctor.

A. I examine between seven and ten patients a day, and see many other people for treatment, consultation.

Q. And during the period of five years it would be how many?

A. It was three years, sir.

Q. Three years.

A. We have twenty working days a month—a couple of thousand, very conservatively.

Q. And this couple of thousand, you remember every one of them as to their particular condition, don't you?

A. No, sir, I don't.

Q. Isn't that so?

A. No, sir, I don't.

Q. You know, Doctor, that the figures that you give [fol. 641] over a period of three years amount to approximately 7200 people?

A. I said very conservatively, sir.

Q. And of the very conservative figure that you give of approximately 2000 a year, you remember almost everyone of those cases and their complaints?

The Court: Don't misquote the testimony, counsel.

A. I didn't——

The Court: Don't act as if people got on the stand and perjured themselves and you were going to expose it. Now you have a very carefully written record, which is far better than the doctor's recollection. He is trying, in my opinion, to tell you the truth and be fair with you.

Mr. Turtur: The written record does not show all of these things, your Honor, please. We were not there at the time.

Q. Doctor, you have discussed this case with somebody, didn't you, before coming to court?

The Court: Of course he has.

A. Of course I have, sir.

The Court: Do you think doctors—treat people as you would like to be treated, will you please, counsel.

[fol. 642] Mr. Turtur: I am trying to do that, your Honor please.

The Court: Don't intimate that they are perjurers.

Mr. Turtur: I am not saying this gentleman is a perjurer.

The Court: The inference is that he discussed the case with people and that they told him what to say.

Mr. Turtur: I want to ask him, if your Honor please, which I respectfully submit I have a right to, is he interested in the outcome of this case.

The Court: Well, I would like to see some authority for that question.

Mr. Turtur: Well, I think your Honor please, that it is elementary where a person may be shown to have a certain interest in a case.

The Court: You can show it if you have extraneous proof. He is employed by the defendant company, that is a matter of record.

Mr. Turtur: All I am asking him now, your Honor please, is whether he has any interest in the outcome of the case. He can answer it as he sees fit.

The Witness: Want me to answer that?

[fol. 643] The Court: Answer any question unless there is an objection.

A. I am not interested one way or the other, sir.

Q. You are not at all?

A. Not at all.

Q. You didn't take any X-rays of Matey's condition of his chest at the time, did you?

A. Matey never had any X-rays for any chest while he was in our employ, no, sir.

Q: As a precautionary measure, you didn't take any, did you?

A. When you say precautionary, what do you mean?

Q. To help you diagnose the case? Does it help you in any way?

A. He had no condition which would indicate that he needed an X-ray, sir.

Q. In spite of his loss of sleep?

A. That wouldn't show from an X-ray standpoint.

Q. And in spite of his other complaints?

A. Well, his main complaint there was his skin condition. Anybody can readily understand that a person who did have a skin irritation and did perspire at night, which we all do, would have excessive irritation at that time, and naturally would be restless and lose somewhat of a night's sleep.

Q. Why do you remember this particular skin condition [fol. 644] over all others, Doctor? Can you tell us, please?

A. You asked *him* about the man, and I said I knew him very well. I remember him very well.

Q. And that is your only answer?

A. George was one of my patients that came in most every day, every other day, and naturally if you run in contact with a man day in and day out, you would know him very well.

Q. And why did he come so many times, Doctor?

A. We watched his skin condition very closely.

Q. That's all, Doctor.

Redirect examination.

By Mr. Rudner:

Q. Doctor, you treated him for the skin condition. That was the condition under the arm and in the groin?

Mr. Turtur: I object to that. He has already explained on direct examination what that condition was.

Mr. Rudner: Cross-examination brought out some facts which I want clarified.

The Court: You may answer.

(Question repeated by the reporter.)

A. Yes.

Q. Is that the condition which you attribute to this fungus?

A. Yes, sir.

Q. You spoke of some other irritation. What was that? [fol. 645] Did you treat him for that?

A. Yes, I did.

Q. What was that?

A. When I first came to the plant he had irritated areas, as I recall, without looking at the records, on his exposed parts, namely, on his hands and his forearms.

Q. Nothing beyond that?

A. No, sir.

Q. And how long did that last?

A. Oh, it lasted on and off, I guess, the best part of maybe a year.

Q. That was the other condition to which you refer?

A. Yes, sir.

Recross-examination.

By Mr. Turtur:

Q. Now, I ask you, Doctor——

Mr. Rudner: Just a moment—that's all.

Q. I ask you, Doctor, did you treat any other skin condition due to irritations?

Mr. Rudner: I object.

Q. In the plant you mean, sir?

A. Yes, sir.

Q. Many of them?

A. No, sir.

Mr. Rudner: I object as incompetent, irrele——

[fol. 646] The Court: You asked the same kind of questions about other plants. You may answer.

A. Many of them? No, I wouldn't say many of them, a low percentage.

Q. What department did they come from?

A. Well, some came from the silicate department, metasilicate, tri-sodium phosphate, phosphates.

Q. The silicate department, I presume, Doctor, you are also including where the soda ash is?

A. Yes, that comes in with the phosphate department.

Q. So that you have treated other cases due to skin irritations that came from that department?

A. Yes.

Q. That's all, thank you.

JOSEPH A. NOVELLO, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Doctor, you are a licensed and practicing physician of the State of New Jersey?

A. Yes, sir.

Q. Have been for how long?

A. Three years.

Q. And graduate of what medical college?

A. Georgetown University.

Q. Where did you serve your interneship?

[fol. 647] A. I served an interneship at St. Elizabeth Hospital between July, 1932, and July, 1933, and at the Alexian Brothers Hospital from July 1, 1933, to July 1, 1934.

Q. Where was that?

A. At the Alexian Brothers Hospital.

Q. At the Alexian Brothers Hospital. You are now practicing medicine in Elizabeth?

A. Yes, sir.

Q. In June, 1934, George Matey came to the Alexian *Brothers Hospital for an operation, is that* so?

A. Yes, sir.

Q. Did you make an examination of George Matey upon his admission to the hospital?

A. Yes, sir.

Q. And what did that examination consist of?

A. It was a complete physical examination with a history, and a complete physical examination.

Q. What did your physical examination disclose?

A. General appearance: Patient is a well developed white male about 45 years of age; head and neck no abnormalities; scalp, no scars; eyes and pupils equal and regular; regular to light and accom-odation; nose, no discharge; ears, negative to external examination; mouth, teeth fair condition; tongue, moist and coated; tonsils, atrophic; chest——

Q. What does atrophic mean?

[fol. 648] A. Means that they were small and buried within the fossa. Chest, symmetrical; lungs, clear and resonant throughout, no rales; no areas of consolidation; heart, size not enlarged, sounds, mitral area and aortic area, rate and rhythm regular, sounds of good quality. Abdomen, liver not palpable; spleen, not palpable; masses, none; tenderness, none; hernia, right inguinal. Genito-urinary system, negative; rectum, negative; extremities, upper right, negative; upper left, negative; lower right, negative; lower left, negative.

Q. Now, this medical statement which you have given, is, of course, your own personal examination?

A. Yes, sir.

Q. And the papers from which you are now reading constitute what?

A. It is a physical examination record of the hospital.

Q. And in your handwriting?

A. Yes, sir.

Q. And signed by you, sir?

A. Yes, sir.

Q. Did he at that time make any complaint in respect to coughs?

Mr. Turtur: I object to that, your Honor please. I think the doctor ought to state what the gentleman said.

The Court: Yes, I think so.

[fol. 649] A. The history——

The Court: Just a minute, Doctor, please. Will you reframe your question, Mr. Rudner?

Mr. Rudner: If your Honor please——

The Court: I think you should reframe it, and I so rule.

Q. All right. What did he say to you with respect to coughs?

Mr. Turtur: I object, your Honor please. He is asking——

Q. What did he say to you?

The Court: On any subject.

A. I have a history which I took from him.

The Court: Read it.

A. The family history: Father aged 71, living and well; mother 66, living and well; brothers both living and well; three sisters all living and well; past history as to childhood diseases, usual diseases, which consist in this: We mean measles, mumps and chicken pox.

Q. Is that the ~~history~~ now of Mr. Matey himself?

A. That is the history of Mr. Matey himself, with no complications. Adult illnesses, none; operations, carbuncle of neck, for which he had an incision and drainage last year; accidents, none; venereal history, denies any venereal diseases; present illness, chief complaint, pains and [fol. 650] swelling in right inguinal region, and he told me that about five months ago that patient was examined by a physician; he was told to be careful in order to prevent the recurrence of hernia. Two months ago he noticed a small swelling in the right inguinal region, which was painful at times. This swelling was reducible, and it continued to get larger. Patient was then recommended to be operated.

Q. That is the complete history as presented to you by Mr. Matey?

A. Yes, sir.

Q. You have given us the whole picture, both with respect to history and medical examination?

A. Yes, sir.

Mr. Rudner: Cross-examine—let me get that date please, I am not sure of the date.

The Witness: June 11, 1934.

Q. And that examination was made prior to an operation for hernia?

A. He was operated on June 12, 1934.

Q. By whom?

A. By Dr. McCallion.

Cross-examination.

By Mr. Turtur:

Q. Doctor, you assist Dr. McCallion occasionally, don't you?

[fol. 651] A. Yes, sir.

Q. And you also do some examination for Dr. McCallion at the General Aniline plant in his absence?

A. Yes, sir.

Mr. Rudner: What plant is that?

Mr. Turtur: The General Aniline plant.

Mr. Rudner: Well, this has no connection with the Grasselli Chemical Company now.

Mr. Turtur: I am merely asking, your Honor, if he does assist Dr. McCallion.

The Court: What has the General Aniline plant got to do with it?

Mr. Rudner: No connection whatsoever.

Mr. Turtur: That he does some work for Dr. McCallion.

The Court: Why did you bring in the General Aniline plant?

Mr. Turtur: That is where he makes examinations of people for Dr. McCallion, your Honor please.

The Court: What is the relationship?

Mr. Turtur: The relationship is, your Honor please, that he is an assistant of Dr. McCallion.

The Court: Well, then, stop at that.

Mr. Turtur: And Dr. McCallion—I am stopping at that.

[fol. 652] The Court: You are not. You are introducing irrelevant matters, I should say, with prejudicial inferences intended.

Q. Now, Doctor, you said that the head and neck, there were no abnormalities. Is that so?

A. Head and neck no abnormalities.

Q. And does that mean also as to scars?

A. Yes, sir.

Q. Well, didn't you notice a scar in the back of his neck, as the result of an examination?

A. At that time it probably was covered over with hair, because I didn't notice it.

Q. Didn't he give you a history of having been cut for a carbuncle at the Elizabeth General Hospital?

A. May I—What I mean by no abnormalities, it means that at the time he had no stiff neck, or no restricted motion. It means he was perfectly normal, so far as any swellings, or any tumors of the head, or any restricted motions.

Q. Well, why did you just say before, Doctor, that abnormalities would mean also scars on the neck, and the reason you perhaps didn't say it was because it might have been covered by hair?

Mr. Rudner: You asked whether the scar constituted an abnormality.

Mr. Turtur: I object to what you want to say, Mr. Rud-
[fol. 653] ner. I am asking the doctor.

The Court: I thought that was in the record. Am I mistaken about that?

Mr. Turtur: I am questioning him, your Honor please, about abnormalities. He said the head and neck there were no abnormalities. Now I am asking him what he meant by no abnormalities.

The Court: Need we waste time in discussing whether a carbuncle is technically known as an abnormality?

Mr. Turtur: But it is very important, your Honor please. He says that everything was 100 per cent, and here is a cut in the back of his neck, and why isn't that down here?

The Court: It is down here.

Mr. Turtur: No, it is not, not from what he read, your Honor please. Now I am asking what he meant by no abnormalities, and if he also meant a scar of the neck, and then he changes his answer. That is the reason for my questions. Does your Honor want Mrs. Bergen to read it back so that I may follow it up?

The Court: I heard it.

Mr. Turtur: I mean those last two questions.

The Court: I heard it.

Q. How tall was he, Doctor, do you know?
[fol. 654] A. I did not measure his head.

Q. Nor did you weigh him?

A. No, sir.

Q. Did you get a complete history from him in the English language?

A. Yes, sir.

Q. Was there some difficulty, sir, in eliciting answers from George Matey?

A. No; I mean not to be so difficult for me to understand any of his answers.

Q. Do you know whether he understood everything you asked him?

A. I spoke to him, so he would.

Q. Well, you don't speak Slavish, do you, Dr. Novello?

A. No, sir.

Q. There was some difficulty in getting certain answers from the man, wasn't there?

A. There was some difficulty, but not much.

Q. But there was some difficulty, wasn't there?

Mr. Rudner: Your Honor, 99 per cent of Mr. Matey's testimony was in English.

A. Yes, sir.

Mr. Turtur: Now, your Honor please, is this fair; is this fair what Mr. Rudner stated now?

Mr. Rudner: That is the fact and the record shows it.

[fol. 655] Mr. Turtur: That is not the fact, and the record shows that the interpreter had to put many questions during the course of the examination.

Mr. Rudner: I say that 99 per cent was in English.

The Court: I only noticed two questions.

Mr. Turtur: Several, your Honor please.

The Court: The record shows it, but I only noticed two.

Mr. Turtur: Well, it is more than two, your Honor please.

The Court: Well, you can read the record and call the jury's attention to it.

Mr. Turtur: But this is cross-examination, your Honor please. May I not proceed with my cross-examination without the interruption of counsel?

The Court: You may not, and no counsel can make inaccurate statements, if they are inaccurate.

Mr. Turtur: They are not inaccurate, in that the Doctor backs me up in stating that there was some difficulty.

The Court: The particular question Mr. Rudner addressed himself to was whether in the deposition the interpreter interpreted. You can count how many times he [fol. 656] intervened. I think it was twice, but I may be mistaken.

Mr. Turtur: Well, your Honor noted, however, the peculiar language used when Mr. Matey answered in English, and the language used when he had to have the interpreter ask him the question. That is the reason I asked the Doctor, and the Doctor now states that there was some difficulty.

The Court: Proceed.

Mr. Turtur: I didn't get the witness' answer.

(Testimony read by the reporter.)

Q. That's all, Doctor, thank you.

Redirect examination.

By Mr. Rudner:

Q. Doctor, did you make Mr. Matey understand every question you asked him?

A. Yes, sir.

Mr. Turtur: I object to that, your Honor please. It would be calling for a conclusion on the part of this doctor.

The Court: Yes, sustained.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 657] William H. McCallion, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Doctor, you are a licensed practicing physician and surgeon in the State of New Jersey?

A. I am.

Q. And are a graduate of what medical college?

A. University of Maryland.

Q. What year?

A. 1915.

Q. And did you serve an interneship somewhere after 1915?

A. I did.

Mr. Turtur: I admit the doctor's qualifications, your Honor.

Q. All right. You are a practicing physician and surgeon, sir?

A. I am.

Q. And in connection with surgery, you performed various types of operations?

A. General surgeon.

Q. Now are you connected with any hospitals?

A. I am.

Q. What hospitals?

[fol. 658] A. I am visiting surgeon of the Alexian Brothers Hospital; assistant visiting surgeon of St. Elizabeth; chief of the surgical clinic of the Elizabeth General Hospital, all in Elizabeth.

Q. All in Elizabeth?

A. Yes.

Q. Doctor, you are not now connected with the Grasselli Chemical plant in any connection whatsoever, are you?

A. I am not.

Q. You were at one time plant physician or something?

A. I was their consulting surgeon.

Q. You were what?

A. Their consulting surgeon.

Q. When was that?

A. From 1925 until 1928.

Q. And in 1928 you terminated your work in that capacity?

A. That's right.

Q. You have had no connection with the Grasselli Chemical since that time?

A. None whatsoever.

Q. Doctor, do you know George Matey, of Linden?

A. I saw him recently.

Q. Now, when did you first see him?

A. I saw him—the record will indicate, I don't know specifically—the record will indicate when I examined him at [fol. 659] the Grasselli Chemical Company.

Q. No, I mean not after the examination—When did you see him in 1934?

A. At the Alexian Brothers Hospital.

Q. In what capacity did you then see him?

A. He was admitted to my service for a repair to a right inguinal hernia.

Q. You were then surgeon at that particular hospital?

A. That's right.

Q. And you were asked on that particular day to perform operations?

A. That's right.

Q. And you performed an operation upon Mr. Matey?

A. I did.

Q. Did you talk to Mr. Matey before the operation?

A. I did not.

Q. You did not. You know he came there for examination?

A. I didn't talk to him.

Q. I mean for an operation.

A. I did not.

Q. Well, when you started operating on him when did you first learn about his being there?

A. On June 11, 1934.

Q. And now did you learn?

[fol. 660] A. He was admitted to my service, and the house physician in charge of course told me that the patient was there, and ready for operation.

Q. Who was the house physician?

A. Dr. Joseph Novello.

Q. The gentleman who just testified?

A. That's right.

Q. Now before you operated, did you have the benefit of the history as taken by Dr. Novello?

A. That's right.

Q. And did you go over that history?

A. We did.

Q. You did?

A. I did.

Q. And having regard to the history and to the examination as disclosed by that report, did you proceed to operate?

A. That's right.

Q. And what operation did you perform?

A. Right inguinal hernia.

Q. (Continuing.) On the strength of Dr. Novello's report?

Mr. Turtur: Well, I object to "On the strength of Dr. Novello's report".

The Court: Sustained.

Mr. Turtur: And I ask that all the testimony which goes [fol. 661] to reliance on Dr. Novello's report be stricken.

Mr. Rudner: Your Honor please, the hospital record is a very important document, something the doctors must rely on and doctors must consult before operation.

The Court: Trival objection.

Q. You did read the report of Dr. Novello before you performed the operation.

Mr. Turtur: I objected to that, and your Honor sustained it.

The Court: Yes.

Q. All right. Now, Doctor, you performed this hernia operation?

A. That's right.

Q. Was it double or single?

A. Single.

Q. Did you give this man an anaesthesia at any time?

A. The man received nitrous oxide and ether in combination.

Q. That is a general anaesthesia?

A. That's right.

Q. Now what did you find upon opening this man for the purpose of operation?

A. He had a direct right inguinal hernia.

[fol. 662] Q. Doctor, what is a hernia, with particular regard to the hernia you found in Mr. Matey?

A. Just simple ordinary routine hernia.

The Court: Commonly known as a rupture.

The Witness: That's right.

Q. What did you observe with respect to Mr. Matey's condition in the course of the operation?

Mr. Turtur: As to what, your Honor please, as to what?

Q. As to the hernia.

Mr. Turtur: Well, we admit he had a hernia, and we admit that the doctor operated on him.

Mr. Rudner: I am not satisfied with it.

Mr. Turtur: I didn't understand counsel's question, sir.

(Question repeated by the reporter.)

A. Well, just a simple hernia.

Q. Just a simple hernia?

A. That's right.

Q. Could you tell what the cause of his hernia was?

A. No.

Mr. Turtur: I object to that, your Honor please.

The Court: He said no.

Q. And after the operation, did you continue to treat Mr. Matey?

[fol. 663] A. I did.

Q. Did you see him?

A. Daily.

Q. During the time he was in the hospital did he cough?

Mr. Turtur: I object, your Honor please.

Q. What did you observe during the course of the time he was in the hospital with respect to Mr. Matey, any part of him?

A. Nothing important.

Q. What?

A. Nothing important.

Q. Anything with his chest?

A. Nothing.

Mr. Turtur: I object to that, your Honor please.

Mr. Rudner: Your Honor please, this is not leading to a position. I am not suggesting anything to the doctor when I speak of chest or other parts.

The Court: You may answer.

Mr. Turtur: Certainly leading questions, if your Honor please.

Mr. Rudner: Not to a doctor. May I have your Honor's ruling, please?

The Court: I allow the question.

[fol. 664] Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed)

Q. Did you notice anything with respect to coughs?

A. None.

Mr. Turtur: Your Honor please——

The Court: Sustained. That is leading, Mr. Rudner.

Mr. Rudner: But your Honor please, I submit it is not leading from this point of view——

The Court: You may have an exception.

Mr. Rudner: May I present the point of view I have in mind without taking much time. Mr. Matey has testified he was coughing all the time. The doctor has said he examined him and noticed nothing else about him.

Q. Outside the hernia, during the time that you saw him at the hospital, did you observe anything at all whatsoever with respect to this man's physical condition?

A. Nothing.

Q. How long was he in the hospital, Doctor?

A. He was admitted on June 11th and discharged on June 26th.

[fol. 665] Q. And you gave him a discharge as being in good health and properly cured at that time?

A. Yes, sir.

Mr. Turtur: I object to that, your Honor please. I think the doctor should be asked how he was discharged.

Q. All right, Doctor, how was he discharged at that time, under what circumstances?

A. He was discharged with simply the notation "Discharged".

The Court: What date was that, Doctor?

The Witness: On the 26th of June, 1934.

The Court: What date did he testify that he went to the other doctor, Runnells, counsel?

Mr. Turtur: He didn't go to Dr. Runnells.

The Court: Well, what was the name of the other doctor he went to?

Mr. Turtur: You mean at the plant?

The Court: No, when he became ill?

Mr. Turtur: Oh, Dr. Steele, your Honor please, became the physician.

Mr. Rudner: No, there was Doctor——

Mr. Turtur: And then he was re-referred to the hospital again, your Honor please, the 20th day after, or the 21st day.

The Court: Of what?

Mr. Turtur: Of July.

[fol. 666] The Court: This is the 26th of June, 1934?

The Witness: That's right.

The Court: And when did he go back to the hospital?

Mr. Turtur: Three or four days thereafter, your Honor. The X-Ray specifically shows it.

The Court: That is what I am getting at.

Mr. Turtur: I will give it to your Honor in just a moment.

Mr. Rudner: Of course, we are dealing with a condition prior thereto, as suggested by Mr. Matey's testimony as to his cough before.

Mr. Turtur: 7/6/34, your Honor; July 6/34.

Q. After this discharge in June of 1934, or July——

A. June 26, 1934.

Q. —you did not see him again for sometime, is that it?

A. I did not.

The Court: Well, Doctor, he was, as I understand it, discharged June 26, 1934. On July 6/34, that is ten days later, he reappeared at the hospital and had X-Rays taken; is that correct?

The Witness: That's right.

The Court: And the X-Rays showed this abscessed condition of the lungs that is correct?

[fol. 667] The Witness: I don't know as to that.

Q. Did you take care of that, did you treat him?

A. I did not.

The Court: So the fact is, he must have either contracted the abscess when he was in the hospital, or had it before he came; isn't that true?

The Witness: Well, I don't know that he has an abscess, your Honor.

The Court: Well, I mean if the X-Rays show it.

The Witness: Well——

The Court: Perhaps I am asking—Is there another doctor?

Mr. Rudner: I am leading up to that, your Honor.

Q. Now, after his discharge from the hospital, when did you next see him, Doctor?

A. I cannot recall specifically the date.

Q. You made an examination of this gentleman last——

Mr. Turtur: March the 6th, 1936.

Q. March 6, 1936?

A. Yes, sir, I saw him with my associate, following his return to the hospital for this acute illness. I saw him merely through the courtesy of the physician who was then in charge.

[fol. 668] Q. When was that?

A. Oh, I should say two or three weeks after his discharge from the Hospital.

Q. Oh, somebody else treated him at that time?

A. That's right.

Q. Who was that?

A. Dr. Knauer.

Q. Of Elizabeth?

A. That's right.

Q. Did you make an examination at that time?

A. I didn't make an examination at that time. I was there with the doctor as he was considering Mr. Matey.

Q. What did you find at that time?

Mr. Turtur: I object to that. The doctor said he didn't examine him, Mr. Rudner.

Q. All right. March 6th of this year you made an examination of Mr. Matey at my request, did you not?

A. I did.

Q. And where was that examination made?

A. At his home in Linden or Tremley.

Q. And were there any physicians with you at that time?

A. There were.

Q. Who?

A. Dr. English and Dr. Pollak.

Q. And who else was there?

[fol. 669] A. Mr. Turtur and Mr. Blachman, and I suppose Mrs. Matey.

Q. Mr. Turtur, counsel for the plaintiff?

A. That's right.

Q. And the gentleman next to him?

A. That's right.

Q. I wasn't there, was I?

A. No, sir.

Q. And did you take a history of this man's case?

A. I took the history as it was recited before Dr. English.

Q. By whom?

A. By Mr. Matey.

Q. Now what did you find with respect to Mr. Matey?

A. I found that he was poorly—very, very much run down. He was coughing, sitting in bed and then reclining, and was coughing spasmodically, ejecting a lot of prurulent sputum.

Q. Now, did you see his X-Rays?

A. I did.

The Court: You are Dr. McCallion, are you?

The Witness: I am, sir.

The Court: The X-Rays are in evidence.

Q. Now having regard to the X-Rays that you saw, and the physical examination which you made of Mr. Matey, what was your diagnosis with respect to his condition?

A. I made a diagnosis that the man had a condition of the [fol. 670] lungs which was called bronchiectasis.

Q. What is that?

A. That is an enlargement of the small bronchioles of the lung, an enlargement with a filling in of fluid.

Q. Wherein did that differ from an abscess?

A. Wherein does that differ from an abscess?

Q. Yes.

A. Well, there is a very sharp distinction between the two, not only from the standpoint of the initial pathology, but from the standpoint of the beginning of the process. A lung abscess is rather an acute thing, following a septic condition either of the mouth or elsewhere, with a radical and a very rapid breaking down of the lung tissue. This so-called bronchiectasis is a different thing entirely, may be residual, following, a case of measles in a little child, and may not ever eventuate into anything, or may assume the pathology which I consider was present in this case, with the breaking down of lung tissue and the spitting of the prurulent sputum which this patient is doing.

Q. You are, of course, not a lung expert?

A. I am not.

Q. You are not professing to be; and have you had any experience in connection with dust cases, the inhalation of dust?

A. Well, nothing——

[fol. 671] Q. What did you say were the general causes of this bronchiectasis which you say you found?

A. Well, in very many instances it is a continuation from a congenital condition of the lungs.

Q. What do you mean by that?

A. From birth, and it is due to a measle cough, any severe cough which one may have, which puts tension or strain on these little dilated bronchioles, which cause them to rupture into each other and make this large mass.

Q. Was the distinction sufficient between an abscess and a bronchiectasis to indicate that this was not an abscess?

A. I felt through my experience, that this was not typically a lung abscess.

The Court: Is coughing the only cause of it?

The Witness: Of what?

The Court: This condition.

The Witness: Oh, no.

The Court: What other causes are there?

The Witness: A man may be subjected to an operation and do perfectly well. This thing being residual, being a primary thing there, a man may do very well, and in the course of time, even up until six weeks later, develop as the [fol. 672] result of that primary residual thing, an acute condition of bronchiectasis which no one knew about, as a matter of fact, in connection with his condition.

The Court: Well, you mean that it is caused by the operation?

The Witness: The operation is the thing which puts the weight on this thing, and causes it to manifest itself in this pulmonary condition in many instances.

The Court: What part of the operation? Surely not the cutting.

The Witness: The anaesthesia; the incident mouth infection or trauma which goes with it.

The Court: Which goes with what, the anaesthesia and the what? I didn't get that.

(Answer repeated by the reporter.)

The Witness: Which goes with the operation.

The Court: Why does a mouth condition come with an operation for hernia?

The Witness: Because they lose their cough reflex when under anaesthesia, and they swallow the infected sputum, and it gravitates in any case of anaesthesia, down the bronchial tract and down into the lung tissues.

The Court: Where does the infected sputum come from in the first instance?

[fol. 673] The Witness: The mouth.

The Court: From what?

The Witness: Due to the 87 varieties of organisms in our mouth, gums, teeth and what not.

The Court: Oh, you mean it might come to anybody?

The Witness: Oh, yes. In other words, I might say that very often following the tragedies of an acute simple operation, a condition about which I am speaking, being there primarily, causes one of the acute conditions of the lungs, which eventuates in very serious infection and in death. That thing is there, and it is not so flagrant that it can be detected on a physical examination.

The Court: Well, could this patient have had this—what's the name?

The Witness: Bronchiectasis.

The Court: Bronchiectasis when he came to the hospital on June 26th, and not known about it?

The Witness: That's right, and I not know about it.

The Court: I don't think he understood my question.

The Witness: Yes, I do, Judge.

The Court: Do you mean he could have had a bron- [fol. 674] chiectasis already?

The Witness: He could have had it there in an area in miniature. He could have had the basis of it there, yes.

The Court: And he not know it and you not know it?

The Witness: That's right, that's right, and hence the tragedy.

By Mr. Rudner:

Q. Now, Doctor, before you operated upon this man——

Mr. Turtur: Does your Honor want some information on bronchiectasis (handing a book to the court)?

Q. (Continuing.) Before you operated on this man, you had this negative history as disclosed by Dr. Novello's record?

A. That's right.

Q. And had that history disclosed a cough, would you have operated upon this man?

A. Not at that time. That man would have been prepared then for a safe operation, safe as we could make it.

The Court: I have examined this deposition of Mr. Matey's, and in four places—pages 14, 32, 39, and 93 were the questions asked in Slavish by the interpreter. In all four of the cases the witness Matey answered them in English, so [fol. 675] my figure of two seems to have been about right.

Mr. Turtur: My figure of several also seems to have been about right, your Honor.

The Court: Several is more than one.

Mr. Turtur: Well, it all depends on how we figure it.

The Court: The dictionary says, which I always rely on, it means more than one.

Cross-examination.

By Mr. Turtur:

Q. Now, Doctor, a bronchiectasis can come from an exposure to inorganic dust, or from an exposure to inhalation to inorganic dust, can it not?

A. Dust works—I am not an authority for this, Mr. Turtur; I merely get my knowledge from the text books, which I have read, of course. The text book says——

Q. Well, now, please, Doctor, you made a very specific statement.

A. From the text books, yes.

Q. I know, but then you weren't testifying from your own knowledge and your own experience, were you?

A. I am testifying from what I am taught as applied to particular cases, or cases in general. I am not an original worker, nor an authority.

Q. You are not an authority in the field of lungs, are you?

[fol. 676] A. I am not.

Q. You are not a specialist in lung conditions, are you?

A. I am not a specialist.

Q. No. The information that you gather you said was gathered from text books?

A. And personal knowledge and experience.

Q. Yes, but you are not depending now in giving your answer on the personal knowledge and experience, are you?

A. I am talking from the three standpoints.

Q. But your main base for your answer is the text books, isn't that so?

A. The three things in connection.

Q. The three things?

A. That's right.

Q. The text books do teach you, do they not, that in addition to lung abscesses, it is very rarely that a person gets that condition as a result of an operation, excepting for a condition of tonsillectomy?

A. Lung abscess is one of the commonest things following tonsillectomy.

Q. Yes. Now tonsillectomy is where you operate along the throat region, isn't that so?

A. That's right.

[fol. 677] Q. And with a tonsil infection when a person is under ether or under a general anæsthetic, a person may breathe the infection that is reposing within his throat and that may lodge on the lung, if that is the pathology, Doctor?

A. Well, I would say——

Q. Or ultimately lodge?

A. You will have to repeat that.

(Question repeated by the reporter.)

A. Well, it is usually a gravitation, not a breathing process, a swallowing.

Q. Well, you will pardon me, Doctor, if I don't understand as much medicine as you, of course.

A. That's right.

Q. Your answer then is, Doctor, that through the medium of the gravitation of a tonsillectomy, this condition can come; that's so, isn't it?

A. That's right.

Q. And is it also your answer, Doctor, that in the majority, or in 99 per cent of the cases, I may be mistaken as to 99 per cent of the cases—I withdraw that. Is it your opinion, Doctor, that wherever you have had lung abscesses due to post operative conditions, that they have been due to operations in the mouth region?

A. That is not necessarily so. You cannot hang it on tonsillectomy alone.

[fol. 678] Q. But tonsillectomy is where you get the majority of cases, isn't that so?

A. Because that is the majority of the operations done.

Q. Yes, and anything, Doctor, with regard to inorganic dust inhalations can also bring about a bronchiectasis or a lung abscess; isn't that so?

A. Let's see, the text book that I read said dust, but didn't say inorganic or organic.

The Court: Well, have you read—"Surgical Diseases of the Chest", by Graham, Singer and Ballon, which counsel for the plaintiff handed me?

The Witness: I didn't read that one.

The Court: Well, at page 604 there are two tables, one table 79, another table 80; table 79 gives 140 cases that have been examined of bronchiectasis without abscess, and then it gives their etiology, which I understand are previous symptoms——

The Witness: No, that is the cause.

The Court: —cause, and that table shows various causes which I won't read, and one cause shows a foreign body. Then the other table has 33 cases, and two cases show a foreign body.

The Witness: That's right; that may be a peanut or a pin or something.

[fol. 679] The Court: It doesn't say. It just says a foreign body. The other causes seems to be a list of common colds——

The Witness: Further down, your Honor please, there is a section——

Mr. Rudner: Your Honor please.

The Court: Just a minute.

Mr. Rudner: I have an objection to make with respect to the court's reading the book.

The Court: You don't want me to read it, or repeat to the Doctor——

Mr. Rudner: I know, sir, but that becomes evidence in this case, and I think it is not proper evidence.

The Court: I say the table shows that.

Mr. Rudner: May I have an exception to your Honor making these statements from the books?

The Court: Strike it out.

Mr. Turtur: May I have it, your Honor?

Mr. Rudner: The doctor can be shown things.

The Court: I read it correctly, Mr. Rudner.

Q. Doctor, do you consider Graham, Singer and Ballon authorities in the field of surgical diseases of the chest?

A. I suppose they are perfectly all right.

Q. You consider them as authorities in that particular [fol. 680] field?

A. They may inject their personal views into that, which I may not be able to accept as being absolutely tenable.

Q. All right, you do recognize them, however, Doctor, as such experts, isn't that so?

A. If they wrote that book, I think they are worth while.

Q. Yes. I ask you, sir, to please read page 603, the end of the fifth paragraph on that page, and ask you to please——

Mr. Rudner: Your Honor please,—wait a minute, Doctor—the Doctor can read that for himself and state if he agrees or disagrees, but I submit that the Doctor, not having relied on that particular book, he cannot——

The Court: I was trying to get him to say whether he agreed or disagreed, and you objected to it, Mr. Rudner, exactly what I was trying to do.

Mr. Rudner: The Doctor is being asked to read statements. If the doctor was present who wrote that book he could be subjected to cross-examination.

Mr. Turtur: As I understand the rule, the law of evidence in producing this kind of books, you first ask the doctor whether or not he recognizes a particular authority [fol. 681] in a particular field, and if he says that he does, then you may refer to that work without the necessity of bringing the author here.

Mr. Rudner: I would like to see a single case covering that, sir.

Mr. Turtur: As I understand it, it is so elementary that I haven't such a case.

The Court: I think you have the rule wrong, I think it is narrower than that. I have always thought it should be as you stated it.

Mr. Rudner: If that doctor who wrote that book was present in court, I would be permitted to cross-examine. As it is, with statements read from his book, I am absolutely deprived of cross-examination.

The Court: Well, of course, I think that is right, under the cases—I think it is nonsense on any sane view of the law.

Mr. Rudner: That is the great weight of authority in this country.

The Court: I think so, too. I think it is nonsense.

Mr. Rudner: The Doctor could be cross-examined on books that he wrote, but not beyond that.

Q. What books have you read?

[fol. 682] A. I have read Practice of Medicine by Sir William Osler; Practice of Surgery, by Dean Lewis in collaboration with a number of other important authors in that book.

Q. Have you ever read any books on lungs or some of their diseases, Doctor?

A. Oh, yes.

Q. And causes?

A. That's *is* right.

Q. And do you now consider Graham, Singer and Ballon authorities in that field?

A. Just let me see that book, please—I would say they are authorities.

Q. And if they, among other things, state in the field of bronchiectasis——

Mr. Rudner: If your Honor please——

Mr. Turtur: Let me finish my question.

Mr. Rudner: Your Honor has ruled against the reading of any part of any man's book.

The Court: What is the use, Mr. Turtur, of getting me to commit an error which would cost you any verdict you might get?

Mr. Turtur: I don't mean to do that. The Doctor just admitted they are an authority in this particular field.

The Court: He didn't rely on it, did he?

Mr. Turtur: Yes, your Honor, he just looked at the book [fol. 683] and made an examination as to who they were, and after he made the examination of the book—Would you be so kind——

The Court: Where is the Du Pont case we had before?

Mr. Turtur: 8 Fed. 2nd 5.

The Court: The rule is very narrow, very much narrower than any sensible——

Mr. Turtur: Your Honor, may I suggest this: If your Honor is afraid of that, I will be very happy to ask him——

Mr. Rudner: Your Honor please, the pressing of that question puts me in a most embarrassing position, in that I had to object, but the rules of law say——

The Court: I follow the rules of law.

Mr. Turtur: I withdraw the question, Mr. Rudner, so you won't be embarrassed.

The Court: It is not accurate to say that you have to object. You don't have to object, even to hearsay.

Q. Doctor, isn't it so that one of the most frequent causes of bronchiectasis is prolonged exposure to inorganic dust?

Mr. Rudner: Your Honor please, unless the dust is dis- [fol. 684] closed——

Q. (Continuing.) Well, soda ash is an inorganic dust, and it was so stated yesterday.

Mr. Rudner: What?

Mr. Turtur: Don't you admit that soda ash is inorganic dust?

Mr. Rudner: Just tell the Doctor about phosphate dust and metasilicate dust.

Mr. Turtur: Well, do you admit that the phosphate and the soda and the silicate and the metasilicate is an inorganic dust?

Mr. Rudner: You ask me. Frankly, I don't know. I suggest you ask the witness.

Mr. Turtur: Mr. Davis, are those three chemicals inorganic?

Mr. Rudner: Don't you answer, Mr. Davis. If you ask the witness he will answer.

Mr. Turtur: You don't want him to answer, all right.

Q. Doctor, do you know whether soda ash, phosphate of soda and silicate dust belong to the group of inorganic substances, inorganic dusts?

A. I am sorry, I cannot say that.

Q. Well, if you are told, sir, that they are inorganic dusts, consider that as a positive hypothesis in your answer, please, Doctor——

[fol. 685] Mr. Rudner: Now, if your Honor please, sodium hydroxid might be an inorganic dust, I don't know.

Mr. Turtur: Soda ash was stated here as being inorganic, your Honor please. Your Honor asked the question I don't know how many times, and I don't know how many times Mr. Rudner did and I did.

Mr. Rudner: I never did. I don't know what the word inorganic dust means.

Mr. Turtur: The chemist did.

Mr. Rudner: Your Honor please, I say sodium hydroxid may be an inorganic dust, I don't know. That being so, the general classification inorganic dust is incorrect.

The Court: I can get a dictionary, Mr. Rudner, and read the difference between organic and inorganic to you if you want it.

Mr. Rudner: But if sodium hydroxid is an inorganic dust, then the question is not proper.

The Court: Ask your own chemist and see what the truth of the matter is.

Mr. Rudner: Mr. Davis says sodium hydroxid is also an inorganic dust, so the question is not accurate.

Mr. Turtur: Didn't you ask Mr. Davis whether all of [fol. 686] them were inorganic, and Mr. Davis nodded his head yes?

Mr. Rudner: That's right.

Mr. Turtur: And soda ash and phosphate of soda and silicate dust are also inorganic, are they not, Mr. Davis?

Mr. Davis: Yes.

Mr. Rudner: I object to the question on the ground it deals with dust, which we do not deal with in our particular case.

The Court: What are we fighting about?

Mr. Rudner: It is now admitted, your Honor, please, that it is.

Mr. Turtur: I withdraw the question.

Q. Isn't it true, Doctor, that most of the frequent causes of bronchiectasis is long exposure to inorganic dusts?

Mr. Rudner: I object, in that inorganic dusts include exposure to sodium hydroxid, which has definitely been eliminated in this case.

The Court: Why your own chemist, Mr. Rudner, just stated that they are inorganic dusts.

Mr. Rudner: But, your Honor, inorganic dusts include sodium hydroxid, which is too general, having regard to the facts we are dealing with.

The Court: Change it to any—are you reading from the [fol. 687] text there—What is the text, please?

Mr. Turtur: Well, I would have to give what the opinion of the Doctor is, and I don't want to do that, in view of Mr. Rudner's objection.

Mr. Rudner: In view of the law, not my objections.

The Court: All right, ask the question.

Mr. Rudner: That is a matter of opinion, Mr. Rudner.

Q. My question, your Honor, is—isn't it so, Doctor, that one of the most frequent causes of bronchiectasis is prolonged exposure to inorganic dust?

Mr. Rudner: I object to that question on the ground that it is too general, that it includes the whole classification of inorganic dusts.

The Court: That is the intention. Go ahead, you may answer.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. I don't know anything about inorganic, but I do know that dust is recorded as one of the chief causes which gives rise to cough, and from cough the breaking down of these [fol. 688] dilated bronchioles, and the eventuation into this lung condition.

Q. Yes, and, Doctor, let me ask you this question, if you don't mind: From your experience, and from what you have read from these texts, which I presume you consider as authorities, anything that can cause a bronchiectasis, may also cause an abscess of the lung, isn't that so?

A. Anything which——

Q. I mean they are closely associated, related.

A. I can conceive of a bronchiectasis—I am sorry, I cannot pronounce that word.

Q. Bronchiectasis.

A. Well, I will call it a bronchiectasis. I will say that bronchiectasis which becomes badly infected, can eventuate in a lung abscess, both being present at the same time.

Q. Then you do agree, do you, Doctor, that a solitary lung abscess may be associated with a bronchiectasis?

A. I don't know about the solitary; I suppose there is quite a difference of opinion as to——

Q. Then let's take out the word "solitary", and I will put it this way: Do you agree that a lung abscess may be associated with bronchiectasis?

A. Yes.

[fol. 689] Q. And a condition that could cause a bronchiectasis you said before, can also cause an abscess of the lung from your past answer.

(Answer to the previous questions repeated by the reporter).

Q. That is all.

The Court: I want to ask a question. Doctor, we have been talking, counsel has been asking you about dust in general. Would there be any causal effect if dust was itself irritating or corrosive?

The Witness: It would only act in the capacity that it is giving rise to coughing. Now coughing is a tremendous effort on the part of the lung, and that in turn, the persistency of the cough and the lack of sleep, the general loss of resistance, may permit this man or woman becoming infected easier, or having a primary thing eventuate into something acutely infected.

The Court: Well, is it corrosive, more cough producing than dust which is not corrosive?

The Witness: I don't know where you would find an answer for that, Judge. After all, it reflects itself on the

patient and on the circumstances surrounding that particu-
[fol. 690] lar instance.

The Court: I mean, what is the cause of a cough?

The Witness: Well, it is an irritation either internal or external. You cough from inhalation of many fumes; you cough from a tumor present on some pulmonary or nerve structure which gives rise to the cough, reflectionary; you cough through habit; you cough through nervousness.

The Court: I am trying to get at whether the quality of the dust, the chemical property of the dust would have any bearing one way or the other upon its cough producing effect.

The Witness: Well, I couldn't answer that specifically. As a general thing, I would say that perhaps we would all cough equally to the exposure of a sneezing powder, or to any other dust which has the propensities of causing the reflex cough.

The Court: Well, has alkali that propensity?

The Witness: I don't know, Judge. I am not qualified to answer that.

The Court: You see, counsel, you seem to be shifting your medical theory here.

[fol. 691] Mr. Turtur: No, I am not, your Honor please.

The Court: Well, you seem to be, because Dr. Gettler testified, as I understood him, his theory was that the alkaline, the increased alkaline particles on the lung brought about this bronchiectasis. Dr. McCallion says, and you seem to be wanting him to say, that the bronchiectasis is brought about by the cough.

Mr. Turtur: No, I didn't say that at all, your Honor please. I beg your Honor's pardon. My questions will all indicate whether or not the condition that brings about a lung abscess cannot also bring about a bronchiectasis, and aren't bronchiectasis and lung abscesses closely associated with and from the inhalation of these irritants, and I presume that Dr. McCallion——

The Court: Well, do you deny that it is the cough that produces it?

The Witness: The irritation first does it, and then the cough breaks down these tissues.

The Court: Yes, and that is not what Dr. Gettler said at all.

Mr. Turtur: Well, Dr. Gettler, as I understand it, says this, your Honor please, that the irritating substance to the [fol. 692] mucous membrane, when they lodge themselves upon the lungs, and then one particle and then another particle, and hundreds of particles cause foci, and then that these foci break out and break down the tissues of the lung.

The Court: Yes, which is entirely different from a cough.

Mr. Turtur: But your Honor, you remember you didn't permit him to testify as a medical man, in spite of the fact that he was a toxicologist and he could have gone on——

The Court: Maybe it is just as well, because you seem to repudiate his theory.

Mr. Turtur: I don't repudiate his theory, your Honor please. As a matter of fact, I not only back up his theory, but authorities here say the same thing.

Mr. Rudner: I object to that, and move that be stricken out, sir.

The Court: Strike it.

Mr. Rudner: May I ask, sir, the protection of the court ——

Mr. Turtur: We have no further questions, your Honor.

Mr. Rudner: Against Mr. Turtur's repeated remarks of this sort?

The Court: I have expressed my opinion about them already.

[fol. 693] A Juror: May I ask a question—this is free advice—in a case of this bronchiectasis latent condition you mentioned, to myself it isn't quite clear. What is it, a growth, or an inflammation, or is it a tendency—I mean, pardon me, just one second, I mean, previous to the breaking out of what happens there, Lord knows I am not straight on that, but what is it previous to that you mentioned that exists due to some congenital cause or something?

The Witness: The sequence, if I may answer your question in this bronchiectasis is that that primarily may not exist alone. It may come from a small localized prelapse of the lung, collapse of the lung. However, in an infant that child will carry that condition until an occasion of whooping cough or measles or some acute respiratory infection comes along. The coughing due to the irritation of that infectious disease superimposed upon this primary collapse of the lung allows of a breaking down, such as if you had a bunch of grapes, and those individual grapes broke down and it became one large mass, no individual grapes being left, due to effort, due to infection, strain, on account of a condition which primarily existed and which [fol. 694] was brought on by the effort of the cough in breaking down little bronchioles.

The Juror: That doesn't quite answer my question. The thing I am trying to get at is this: As long as the word was mentioned, is there a sharp line of demarkation between the time when there is no manifestation of some sort of a disease and the time when there is a manifestation of disease? In other words, is there a definite point in this development where you can say that something is there, because of inflammation or something else—I don't know just how it manifests itself—and the time when there is definitely something showing?

The Witness: Well, in particular cases, yes, and in particular cases, no.

The Court: That's all, Doctor, thank you.

Redirect examination.

By Mr. Rudner:

Q. Doctor, have you ever heard of bronchiectasis or abscess coming from the inhalation of phosphate dust?

Mr. Turtur: I object to that, your Honor please. That isn't it.

Mr. Rudner: Dr. McCallion was asked the question in respect to inorganic dusts generally. Now I am going to particularize.

[fol. 695] The Court: You may answer.

Mr. Turtur: I withdraw the objection, your Honor please.

A. I have not.

Q. Have you ever heard of an abscess or bronchiectasis coming from the inhalation of metasilicate dust?

A. I have not.

Q. Have you ever heard of bronchiectasis or abscess coming from the inhalation of soda ash dust?

A. I have not.

The Court: That's all, Doctor.

Recross-examination.

By Mr. Turtur:

Q. Have you ever heard of bronchiectasis or abscesses ever coming from the inhalation of inorganic dusts?

Mr. Rudner: I object on the ground that question is too general. It includes dusts other than those——

The Court: He may answer.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. I have heard of this condition following the inhalation of dust.

Q. You have?

[fol. 696] A. A dust.

Q. That's all.

By Mr. Rudner:

Q. What kind of dust?

A. It wasn't qualified.

The Court: It wasn't analyzed. You didn't know the chemistry of it?

The Witness: That's right.

By Mr. Turtur:

Q. You don't know what the chemical analysis of soda ash, phosphate of soda, silicate dust is, do you, Doctor?

A. I do not.

Q. You don't know whether they are alkaline or not?

A. I do not.

Mr. Rudner: Dr. Pollak.

The Court: I have to adjourn now, because I have two tax attorneys here on matters that I have to decide.

Afternoon Session

The Court: Where did Dr. Wiener go? Dr. Wiener has the information we spoke about yesterday, so I will just let him resume the stand.

[fol. 697] William Wiener, recalled by the Court.

By the Court:

Q. What we wanted to know, Doctor, was the comparative quantity of hydroxyl ions in sodium carbonate and sodium hydroxid in percentages or any other way you want to put it, ratios.

A. The number of hydroxyl ions in sodium carbonate would be about 2, and the number in sodium bicarbonate, or in sodium hydroxid, it would take more, probably double that, double to treble that.

Q. Well, which? That's the thing we wanted to be a little more accurate, if we could.

A. Well, it would take probably in the proportion of 4, it would be 4 times as many proportionately.

Q. In sodium hydroxid?

A. In sodium hydroxid.

Q. It would be the ratio of 1 to 4 then, is that it?

A. Yes.

Q. Could you say how you figured that out?

A. Well, by taking the atomic weights of the substances, with sodium carbonate the atomi[illegible] there is 106, and the number then, if that is hydrolyzed or ionized, as it ionizes when it is dissolved, it gives 2 hydroxyl ions; whereas, with the other it would take 4, it would take more, and the hydroxyl in proportion, it would be 40. The atomic [fol. 698] weight of the sodium carbonate would be about 106. The atomic weight of sodium hydroxid is 40, and gives you the stronger base and makes the hydroxyl ions stronger in the sodium hydroxid.

The Court: Do you want to ask him any questions?

Mr. Turtur: May I ask the Doctor, your Honor please, what book he is reading from, please?

The Court: Yes, certainly.

The Witness: I thought I would bring one of the simplest texts and one of the newest texts, and that is Black and Conant, published by Macmillans. It is the latest work.

By Mr. Turtur:

Q. The hydroxyl ions, Doctor, are the OH symbol in the chemical structure, isn't that so?

A. Well, only when they are separated. There is no OH in the Na_2CO_3, except when it is dissolved in water. Then it forms hydroxyl ions.

Q. That is what we are talking about now, sodium carbonate, or soda ash. There is the Na_2CO_3 plus H_2O, isn't that so?

A. Crystallized or—

Q. In the sodium carbonate, in other words, you agreed [fol. 699] with the charts as made by Professor Gettler. Those are what you said were correct.

A. Those are correct.

Q. That is all thank you.

The Court: Do you want to ask him anything?

Mr. Rudner: That's all, Doctor; no questions.

The Court: Do you want to leave that book with us?

The Witness: Yes, sir.

The Court: All right. We will return it to you. Thank you, Doctor. All right, go ahead, Mr. Rudner.

SIMEON OLEYNICK, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Mr. Turtur: Your Honor please, I admit the Doctor's qualifications as a skin specialist. I know him to be such in Elizabeth, and he is a good one.

Q. Doctor, where do you have your offices?

A. I have offices in Newark and Elizabeth.

Q. Your specialty is that exclusively of skin?

A. Yes.

Q. Are you a member of any special boards in connec- [fol. 700] tion with your specialization?

A. Yes.

Mr. Turtur: I admit the Doctor's qualifications.

Mr. Rudner: I would like to elaborate on the Doctor's qualifications.

A. I am a member of the American Board of Dermatology.

Q. Now, Doctor, are you in any wise connected with the Grasselli Chemical Company?

A. No, in no way.

Q. Have you ever been connected with the Grasselli Chemical Company?

A. No, I have never been connected with it.

Q. How long have you been specializing in skin ailments?

A. Since 1913, 23 years.

Q. Doctor, you at one time treated Mr. George Matey, did you not?

A. That's right.

Q. Tell us when you first treated him.

A. I first saw him March 6, 1933.

Q. And where did you see him?

A. I have seen him in my Elizabeth office.

Q. He was seen there, was he not, by someone from the Grasselli Chemical Company?

A. Yes, he was seen by the Grasselli Chemical Company.

[fol. 701] Mr. Turtur: Seen by whom, please?

The Witness: By the Grasselli Chemical Company, the physician of the Grasselli Chemical Company, rather.

Q. Now, Doctor, you examined the man, did you not?

A. I did.

Q. Now, tell us, step by step, what you saw, what you observed in connection with this man's condition, what you did from time to time, in chronological order. Tell us as fully as possible.

A. Well, I have seen him at that time; in other words, beginning of March, 1933, and he had inflamed areas pretty well spread all over the body, except for the exposed areas, and especially around the armpits.

Q. Now you say except for the exposed areas. What do you mean by that?

A. I mean the face was not affected, and the hands were not affected.

Q. All right. Go ahead.

A. And at that time that I have seen that, of course I couldn't make a proper diagnosis, and I asked a physician of the plant, or anybody who is connected as superintendent, to send me the materials which the patient was working with. He was exposed to certain chemicals working in a chemical factory, and usually, if we do tests which we call patch tests, it means we take exactly the same ingredients [fol. 702] in the same mixture, which is what is of importance, of course, and we apply it to certain parts of the skin, and we observe it for a certain number of days. In other words, we see it 24 hours later, 48 hours later, 72 hours later, because sometimes we see the so-called late reactions from the tests which I made. From two mixtures which he was using, I have made the tests.

Mr. Turtur: I object to the tests, your Honor please, unless he states what the chemicals were that he subjected him to.

The Court: I certainly assume he is going to come to it.

The Witness: No, your Honor, I am not going to come to it, because we never do that. We always get only the material he is working with in the same proportion. Now, for instance, if there is a percentage of any irritating material,—if you take it pure, any person may get an irritation, but in this particular proportion, he may not get it. I will just give an example: If a man works with paint, for instance, the man may ~~not~~ get an irritation to paint, although it contains turpentine, but he will get an irritation to pure turpentine. In other words, when I am asking him—I have to do very often these tests, not only in occupational diseases, but also, for instance, in cosmetic affairs, [fol. 703] I am getting exactly the same material to which this particular person is exposed. Now if I am asking to bring me from the factory, I am asking usually to send the same exact mixtures to which that particular patient is exposed, and according to these mixtures, and only according to these mixtures we can use.

The Court: All right, go ahead; tell us what you did.

Mr. Turtur: Well, I object to it, your Honor please, on the ground that we don't know whether the chemical sent is the chemical that he was subjected to, and the ratio.

The Court: Of course, we will have to find it at the other end. You may answer, doctor.

A. So we take, of course, in good faith that we are getting the right material.

The Court: Yes, I know that.

A. (Continuing.) Now the tests did not show any reaction. It was negative. That means there was no reaction to it whatsoever. I have taken him, and I have seen him a few times.

Q. What days, Doctor?

A. March 17th, 22nd, 29th. In the meantime, of course, I treated him locally April 5, April 14, April 21, April 28.

[fol. 704] Q. Of 1933?

A. Of 1933. Then I have seen him again. Then I haven't seen him since April 28, 1933, until November 3, 1933, and at that time he had again scattered eczema patches, scattered eczema over his body.

Q: Where?

A. Over his body, especially on the so-called intrignous places—intrignous we call all the places which are exposed to friction; for instance, the armpits, around the genitals, around the buttocks; sometimes between the toes, which means wherever there was perspiration and friction, he had these eczematous patches, and then it was very suspicious to me of a disease which we see very often here in this part of the country especially, and that is a disease which is caused by ringworm fungi, and I have made tests with extracts from these particular ringworms, which I suspected, and the test was made in November, 1933, November the 6th, 1933. He had a pronounced reaction to so-called oidomycetes, which belongs to the group of yeast fungi. It was a late reaction. Sinct that time I have seen him in November; then I have seen him again in January, 1934 a few times; then in February, 1934. The last time I have seen him was February 22, 1934. There was no reaction whatsoever. I treated him with that extract during the time of these fungi and this ringworm. He had no re- [fol. 705] action since to this fungi, and he complained that he had an irritation of his body since he wears woolen underwear. It means that, as we often see in hypersensitive individuals, he reacted to wool. Wool fibers do irritate often hypersensitive individuals, regardless of what may be the cause. As you see, I have treated him, the last time not merely for his ringworm infection, which he had——

Q. What was your final diagnosis as to the cause of this man's skin condition?

A. My final diagnosis, as I reported to the physician, was that he had an epiderma foetosis, which means a superficial ringworm infection.

Q. That is a natural condition that comes within the system?

A. No.

Mr. Turtur: I think the Doctor ought to state that, your Honor please.

A. Epiderma foetosis is a superficial infection. Of course, in this case especially, he having a long time epiderma foetosis, the body reacts in a different way, and that's why we are doing these tests. These tests for ringworms are just to be compared with the so-called Schick test for dip-theria, where the patient shows he is susceptible [fol. 706] to dip-theria. That is the same principle.

Q. That is all.

Cross-examination.

By Mr. Turtur:

Q. Doctor, is it possible that this man, having no reaction to this dust, could have shown marked irritation as soon as he started to work under the chemical conditions?

A. That, of course, can be any aggravation of an existing condition that may produce symptoms. I mean regardless of what it is. If a man has poison ivy and he works, he may have of course an aggravation. That is why we prescribe for these people rest.

Q. An irritation to the skin can come as a result of being exposed to chemical dusts?

A. It certainly can.

Q. Now supposing, Doctor, when he was moved outside from the plant and his skin cleared up until he came back, and then you have the irritation again, is your answer still the same?

A. Well, my answer is so that I can be guided only by that which I can prove.

Q. Well, supposing the proof, sir, is that when his skin cleared up when he worked outside for a little while, and then when he again came into contact with these chemical substances, the irritation again appeared, what is your [fol. 707] answer to that?

A. I would be at least suspicious, but I would have of course to cut out the possibilities of perspiration, of heat, and all the other things which go with it. The thing that led me to watch him very carefully as to ringworm infection was that he had no irritation on his face whatsoever. There was no eczema on his face. Usually we see in people who are working in chemical factories, the first thing what strikes them is the face and the hands.

Q. Supposing I were to tell you, Doctor, that this gentleman originally felt a symptom of a pimple in the back of his neck as a result of irritation, and then it turned out to be a carbuncle, when he was subjected to these chemical fumes, what would you say as to that?

The Court: What do you mean, as a result of irritation? What testimony was there to that effect?

Mr. Turtur: He says he first felt a pimple.

The Court: He didn't say as the result of irritation.

Mr. Turtur: As a result of this exposure.

The Court: That is a conclusion.

Mr. Turtur: All right, I withdraw that, your Honor.

Q. Doctor, what is the importance of perspiration to the [fol. 708] exposure and inhalation of chemical dusts, inorganic dusts?

The Court: The Doctor is a skin specialist. The question includes inhalation.

Mr. Turtur: Well, your Honor, he just mentioned the word perspiration.

The Court: With reference to skin surface. You cannot inhale with your skin, can you?

Mr. Turtur: Yes, your Honor, the skin does inhale. We have three layers of skin, as I understand, and when you are subjected to a certain amount of heat, these pores open.

The Court: Let's not call it inhaling.

Mr. Rudner: It is not inhalation.

Mr. Turtur: Subjected to inhaling is the word, breathe in.

Q. Doctor, does the skin breathe?

A. Well, the breathing of the skin is very minimal. It is an exchange of gases to such a degree which can be absolutely discounted.

Q. And when there is, Doctor, this perspiration, is there an irritation to skin when these chemicals which are irritants, come in contact with the skin that is perspiring?

A. You see, people do perspire usually when they work, and especially when they work in factories, and especially [fol. 709] on hot days, for instance, or even in winter where there is a high degree of temperature, and regardless of what skin inflammation you may have, excessive perspiration of course will cause an irritation. You see that is common sense.

Q. Well, what is the effect of an alkaline substance coming in contact with skin when you perspire?

A. Well, it is a question of the degree of course.

Q. Well, supposing, Doctor, that this gentleman had been exposed for years to an alkali substance, and the exposure was at times almost as heavy as smoke, this dust was almost as heavy as smoke about where he was working, and he couldn't see his fellow men from one end of the room to the other, and if he were exposed to that kind of condition for a period of years, working eight hours a day, sometimes clearer than others, what would you say to that?

A. I would say that I don't know it, I am not familiar with the conditions in the factory itself, but I would say that we do kind of imitate in our tests the conditions which are presented while they are working. In other words, when we put on this chemical on the skin, we first put on the chemical, then we cover with gloves.

Q. Doctor, I didn't ask you that.

Mr. Rudner: The Doctor is answering the question.

[fol. 710] Mr. Turtur: Pardon me. My question——

Mr. Rudner: Your Honor please, the Doctor is answering the question, and I submit he should be permitted to answer it.

Mr. Turtur: May I have a responsive answer? He is going to go into a different theory. Would you be so kind as to listen to the question?

(Question repeated by the reporter.)

A. I would say that countless men are working under the same conditions, and very few are getting occupational affairs.

Mr. Turtur: Now I ask that that be stricken out, your Honor please, on the ground that that is not responsive to my question. My question is specific. This gentleman is supposedly a skin specialist, and he knows, or should know what the answer would be to a question of that sort when a man is so exposed.

The Court: I think he was doing his best.

Mr. Turtur: Well, may I have an answer to my question, your Honor please?

The Court: I could put you questions and you me that neither of us could answer.

Mr. Turtur: That is true, there are a lot of questions I cannot answer, but this gentleman holds himself out as a specialist, and he says he has made tests with this gentle-[fol. 711] man. I want to know now when a man is subjected to that kind of condition what effect does that have on his skin, the perspiring condition.

Mr. Rudner: Doctor——

Mr. Turtur: Pardon me, Mr. Rudner, that is the theory that the Doctor is going on.

Mr. Rudner: The Doctor did give a responsive answer, your Honor please.

The Court: I thought so.

Mr. Turtur: I ask that the last answer be stricken, your Honor please, and may I ask that your Honor instruct——

The Court: Motion denied. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Doctor, isn't it so that considerable damage could be—I withdraw that.

Q. What kind of test did you give to George Matey?

A. You mean the test as to his occupational complaint, or the test as to his ringworm infection?

Q. I mean, sir, the tests that you made as to his occupational disease?

[fol. 712] A. I applied to his body, to a small surface, the ingredients he is working with. In other words——

Q. What ingredients?

A. Which I got from the factory.

Q. What did you get from the factory?

A. I cannot tell you that exactly. I have it in my records, but probably I talked it over at that time with the physician, and the factory usually sends exactly—and that is what I am arguing——

Q. Just a minute——

Mr. Turtur: Now, your Honor please, I move that all of the testimony of this gentleman be stricken on the ground that the Doctor does not know the kind of chemical that he applied to this gentleman's skin. Now there are countless numbers of chemicals that they manufacture down there. The thing that we are interested in is that they sent him the particular substance which we are interested in.

The Court: It will be stricken unless whoever sent it to him testifies.

Mr. Turtur: Well, he is now relying on what somebody else told him, your Honor please——

Mr. Turtur: Pardon me just a minute.

Q. Chemicals, Doctor, which are irritating in kind and [fol. 713] quality have an irritating effect upon the skin when that skin is exposed to it, and especially you say when it perspires, isn't that so?

A. I didn't say when it perspires; when it is exposed to it.

Q. Yes, even without perspiration?

A. Absolutely.

Q. So that if this man worked over a period of years subjected to a condition which I explained to you before, Doctor, that this irritating substance was present to the extent of where it was almost like smoke in density, and he couldn't see his fellow men from one end of the room to the other, wouldn't you say, Doctor, that that kind of a condition had an influence upon the irritating condition of the skin?

A. May I explain to you a little, because it seems to me that you don't understand——

Q. I don't want any explanation, Doctor; I want your answer, if you don't mind.

A. No, there is an explanation necessary, because——

Q. Now just a minute. The Judge is here to rule that, Doctor Oleynick.

The Court: He may answer the question. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby [fol. 714] allowed and sealed accordingly.

William Clark. (Sealed.)

A. May I explain?

The Court: Yes, Doctor.

A. The idea is that we are all, every human being has a different resistance to different things. You can see in a factory as I already mentioned, working two hundred men with certain ingredients, regardless of what it may be, 198 will be well all the time; the 199th or the 200th may respond. You may see ten people going out in the woods and one of them gets poison ivy—nine come home, and we will see it all the time. What does it mean? It means that that particular person is what we call allergic; it means hypersensitive. The question for me to decide was is that particular patient hypersensitive, yes or no. I am dealing with the factory physician. The factory physician has to deliver to me the material. I cannot see the chemical formulas. He delivers to me the material. I am doing the test, and I decide is he hypersensitive, yes or no, that is my question to answer, else I cannot give you any information about materials and chemicals, just the same as I am doing cosmetic tests on thousands of cosmetics which women are using.

Q. You said that a minute ago. We are not applying [fol. 715] rouge in this case. Doctor, after your explanation, for which I thank you, will you please answer my question?

A. If that particular man or this particular patient would be hypersensitive to the particular chemicals he employs, he would in all probability show a reaction of his skin. My records show that that did not show to these chemicals which I received from the physician in good faith,—and we believe each other in the medical fraternity.

Mr. Turtur: Now I ask that the last part of the answer be stricken, as your Honor has already ruled—he may be a good speaker, your Honor please, but we are trying to find out what tests he made and with what chemicals, and your Honor has already ruled.

The Court: On what ground?

Mr. Turtur: On the ground that we do not have before the court and jury whether the chemicals received from this factory were the——

The Court: I did not already rule that way, counsel. Please don't misquote me.

Mr. Turtur: I am sorry, your Honor, I don't mean to.

The Court: I said if the chemicals were not properly connected later on by another witness, you can move to strike out.

[fol. 716] Q. There are some people you say that are more sensitive to an irritating substance than others; isn't that so?

A. That is right.

Q. Have you had any other cases from the Grasselli Chemical Company for treatment of skin irritations due to chemical subjection?

A. I cannot tell you offhand, but I may remember a few of them. I just have seen,—no, it was about a year ago, I have seen one of the chemists, who are working—I don't know was it Grasselli or was it Aniline Dyes, I am not sure about it, I am seeing a large number of people, it is very hard for me to remember, and that man had an inflamed face that you wouldn't recognize his features, because as a chemist he puts his nose in every bottle——

Q. Doctor, I didn't ask you that.

A. That is what I wanted you to know.

Q. Pardon me, Doctor, I mean to be respectful to you, Doctor, but I am asking you a question, and that question, without speeches is, have you ever treated any other cases from the Grasselli Chemical Company for skin irritations that were subjected to irritating substances?

Mr. Rudner: I object.

[fol. 717] A. Absolutely.

Q. Absolutely is your answer?

A. Absolutely.

Q. That's all, Doctor.

Mr. Rudner: Just a moment, please. This covers the whole plant of the Grasselli Chemical Company without being limited to the silicate department or phosphate department?

Mr. Turtur: Why, he covered——

Mr. Rudner: I move that the answer be stricken out.

The Court: It will be limited, of course.

Mr. Turtur: Why, your Honor, he covered all sorts of departments, from the Solvay Process, going back 35 years, your Honor please.

The Court: Soda ash.

Q. How about soda ash, Doctor?

A. I don't know anything about it. If you will allow me to, I will explain it to you.

Q. Doctor——

The Court: I don't blame you, Doctor.

The Witness: May I finish that?

The Court: Yes.

A. (Continuing.) This particular chemist works in a chemical laboratory where they have a concentrated affair——

[fol. 718] Mr. Turtur: Now, your Honor please, I am objecting to this, and I want to do so most strenuously. My question was—Did he treat any other cases from the Grasselli Chemical Company that were exposed to soda ash.

The Court: All right, stop there.

The Witness: No.

Q. To phosphate of soda?

A. I cannot tell you.

Q. To silicate dust?

A. I cannot tell you that either.

Q. To any caustics?

A. I couldn't tell you as to any chemical.

Q. You have treated them, but don't know for what chemical you treated them.

Mr. Rudner: Just a moment. That is an unfair question.

Mr. Turtur: That isn't an unfair question, your Honor please.

The Court: I think it is.

Mr. Turtur: Well, he did, your Honor please, admit that he——

The Court: Do you know what department the men in the Grasselli plant which you treated, came from, Doctor?

The Witness: No, I don't.

[fol. 719] Q. You don't know, do you?

A. No.

Q. That is all.

Redirect examination.

By Mr. Rudner:

Q. Doctor, this test that you made of Mr. Matey, the skin test, in connection with some chemicals that were delivered to you——

A. Sure.

Q. —was that made in the presence of Mr. Matey, did he actually see it?

A. He brought them to me.

Q. That is what I wanted to get.

A. The patient is the man who brings them to me. I send them back to the factory physician and ask for a sample.

Q. So you used the samples that Mr. Matey brought to you?

A. That's right.

Q. And you used those samples in making those tests?

A. That's right.

Mr. Turtur: Are you through?
Mr. Rudner: Yes.

Recross-examination.

By Mr. Turtur:

Q. Doctor, will you be so kind as to just turn your mem- [fol. 720] ory only a few minutes ago? Do you remember what you just told this court and jury?

The Court: Don't insult people, counsel. Really I don't want to have to keep admonishing you. Your manner is insulting and your questions are insulting.

Mr. Turtur: But your Honor please, I am trying the case for my client.

The Court: That doesn't give you any license in this court to insult people.

Mr. Turtur: Well, your Honor please, in the one breath he says the doctor sent him these chemicals. Now he tells us Mr. Matey sent them to him.

The Court: The witness said——

Mr. Turtur: Now may I ask——

The Court: His testimony was that he received them from the plant. His testimony now is in supplement or modification of it that they were brought by Mr. Matey.

Mr. Turtur: May I ask that your Honor please be so kind as to allow me to ask Mrs. Bergen to read that portion to your Honor as to where he stated that the Doctor gave it to him?

Mr. Rudner: No, he asked the Doctor——

The Court: Do you deny that Matey brought them, or [fol. 721] don't you know?

Mr. Turtur: I am only taking the word of the Doctor.

The Court: Are you now suggesting that the plant physician walks into the Doctor's office with the material?

Mr. Turtur: I am now suggesting, your Honor please, that I want to know from Dr. Oleynick what kind of material he got, and whom he got it from.

The Court: He says they were brought to him in the sense that they were handed to him in the office by your client.

Mr. Turtur: And in one part of the testimony he stated that they were given to him by the Doctor in good faith.

Q. Who paid you for these treatments?

Mr. Rudner: What is the fact with respect to these powders? How did they come into your possession to make these tests?

The Witness: The procedure is so, when I examine a patient——

Mr. Rudner: No, in this case.

The Witness: Just a moment. I am either usually calling up the factory, or the doctor, whoever it is, or I am writing a letter with request to send it to me; ninety-nine [fol. 722] per cent of the patients bring it the next time, because he has to bring it in order that the ingredients be applied.

Mr. Turtur: May I ask that that portion be stricken?

The Court: What portion?

Mr. Turtur: Ninety-nine out of a hundred. Was it done in this case?

The Court: He said it was. The other part may be stricken.

The Witness: I just wanted to give an illustration, your Honor.

Q. I didn't ask for an illustration.

A. You don't need to be so caustic. You are just asking questions. I will be glad to answer them, but I don't like the form.

Q. Well, I am sorry you don't like it, Doctor; if you had a better memory I wouldn't ask it. Now I ask you, Doctor, who paid you for the treatment you rendered Matey?

A. The bill is sent in to the company, the company pays for it.

Q. Thank you. That's all.

Virgil S. Pollak, called and sworn on behalf of the defendant, testified as follows:

[fol. 723] Direct examination.

By Mr. Rudner:

Q. Doctor, you are a licensed practicing physician of the State of New Jersey?

A. I am.

Mr. Turtur: I admit the Doctor's qualifications.

Mr. Rudner: I should like to elaborate the Doctor's qualifications.

Q. And have been for how long?

A. In New Jersey since 1899, and prior to that in Pennsylvania since 1895.

Q. Of what college are you a graduate, medical schools?

A. Dartmouth.

Q. Of what medical schools?

A. Dartmouth and Pennsylvania.

Q. Graduate of Pennsylvania. What year?

A. 1895.

Q. After graduating from Pennsylvania, where did you go, what did you do?

A. I went to Polyclinic, Philadelphia, and served with my uncle as an assistant there. He was surgeon in chief in that hospital. Subsequently I was sent by Dean Marshall to take charge of the Pottsville Hospital at Pottsville, Pennsylvania. That was in 1896. In 1899 I moved to Jer- [fol. 724] sey, and I have been practising in New Jersey since the first of May, 1899.

Q. Do you specialize in any field of medicine?

A. I do.

Q. What is that?

A. Tuberculosis.

Q. And how long have you so specialized?

A. Since 1906.

Q. And what institution are you now connected with?

A. I am and have been medical director Hudson County Tuberculosis Sanitarium since December, 1906. I am chief of the Tuberculosis Division of the Jersey City Medical Center, of the Tuberculosis Division of Christ Hospital in Jersey City, of the Tuberculosis Division of St. Francis Hospital in Jersey City. I am consulting phthisicist Bayonne Hospital in Hudson County, and St. Mary's Hospital in Hoboken. I am also chief of the Advisory Committee of the Deborah Sanitorium at Brown's Mills, Burlington County.

Q. Now, in connection with specializations which you practice, what general fields and special fields do you cover?

A. The chest.

Q. And does that mean diagnosis, treatment, surgery?

[fol. 725] A. That all comes under my supervision.

Q. You are also a lung surgeon?

A. I am not a lung surgeon.

Q. What do you do in connection with your specialization?

A. Well, cases are referred to us, usually because tuberculosis is suspected. Then we go into the diagnostic features of diagnosing either for the physician who sends the case, or for the information of the patient that consults us regarding the——

The Court: What is the point of this?

Mr. Rudner: Well, I am coming to that.

Q. Now, Doctor, have you been on any national or international congresses or associations in connection with lung work?

A. Yes, sir.

Q. What were they?

A. Well, I have been——

The Court: Oh, we admit Dr. Pollak's qualifications. Don't elaborate to such a great extent, please.

Q. Now Doctor, can you tell me——

The Court: Where is that book of yours?

Mr. Turtur: I have several.

The Court: That one this morning.

Q. Doctor, can you tell me how many persons you exam- [fol. 726] ined in connection with lung work since you started specializing in lung diseases?

A. Well, in the thirty years I have examined several hundred thousand patients.

Q. And of those several hundred thousand patients have you had any cases involving abscesses of the lung?

A. Yes, sir.

Q. About how many?

A. Oh, hundreds of them; I don't know how many.

Q. Have you had any cases involving bronchiectasis?

A. Thousands of them.

Q. Now, Doctor, did you at our request, make an examination of Mr. Matey in March of this year?

A. I did, sir.

Q. And where was that examination made?

A. In Linden at his home.

Q. And who was there?

A. His counsel.

Q. Mr. Turtur?

A. I think there was another gentleman there.

Mr. Turtur: Yes, Mr. Blachman, this gentleman here.

A. (Continuing.) Dr. English, of Glen Gardner, who happens now to be sick in bed in Philadelphia, after an operation, and Dr. McCallion.

[fol. 727] Q. Now, Dr. English was with you?

A. Yes.

Q. And Dr. English is who?

A. Dr. English is the medical director and superintendent——

Mr. Turtur: Now, your Honor please, we are not going to go into who Dr. English was.

The Court: Is he going to be here?

Mr. Rudner: We cannot produce Dr. English. He is sick.

The Court: All right; then you cannot show who he is, or anything about him.

Mr. Rudner: I want the record to show that my inability to produce Dr. English is that he is sick in the hospital.

Mr. Turtur: We agree that if you represent he is sick, he cannot be here.

Mr. Rudner: Very sick. We cannot even take his deposition. All right.

Q. Now, Doctor, what did this examination of Mr. Matey consist of, made by you?

A. Well, we have first attempted to get a history of the patient. Dr. English did the cross-examining or the questioning, and shortly after we began this gentleman interposed an objection that he would not permit us to continue [fol. 728] with the cross-questioning of the patient, to which we naturally subjected ourselves, and we then made a physical examination of the patient.

Q. What did that consist of?

A. Physical examination of the patient is an academic one, consisting of several stages. We naturally had the patient stripped. We inspected him, looked him over, and palpated him attempting to get the sound of his voice, spoken voice, and then percussed him, in order to get the difference, if there be any, in the lung substance, and finally ausculted him, that is, we listened to the chest with an instrument which is commonly known as a stethoscope. We took his temperature, and prior to that we of course had seen the same X-Ray—I don't know just which X-Ray, but I think the X-Ray which was taken the second time he was in the hospital. In addition to that, we investigated the history of the patient while in the hospital, for the herniotomy.

Q. That is for the hernia operation?

A. Yes, what was referred to here this morning.

Q. Now I show you these X-Rays which are in evidence, P-3. I am going to ask you whether these X-Rays were examined. I will put them in chronological order. There are here six X-Rays, Doctor; I would like to have you check them, tell me whether they are the X-Rays you examined, and having examined the X-Rays, and after your physical [fol. 729] examination of Mr. Matey, just tell me in your own words what you found and what your conclusions are. Apparently there is no lamp here, so you will have to use this light. That is the first one, dated what, read here in the corner?

A. 7/6/34. This is a rather indistinct X-Ray of the chest, which gives us evidence of some shadow at the right lower lobe. The left is fairly normal.

Q. What date is that, sir?

A. First of October, 1935, which also indicates an abnormal shadow, with left side being normal, and the upper apices, that is the apex of the lung, is clear. This is a lateral view of this case taken the 11th of October. This is also a lateral view shot through this way. I mean by shooting through that the exposure was taken laterally. This is an X-Ray taken on the 25th of November, 1935, and continues to evidence the shadow left side. This is a very poor plate, but it also shows——

Q. What date, Doctor?

A. 2/25/36. This is a very poor plate, but shows distinctly a shadow here, and clear tissue on the left side.

Q. Now, Doctor, having examined those X-Rays which you have seen before, and having had this physical exam- [fol. 730] ination of Mr. Matey, what were your conclusions with respect to that man's condition at the time you examined him? Now give us as fully as you possibly can.

A. In view of the history, which of course, plays a very important part in our decision and in our diagnosis of having had a man who, as far as our history was able to obtain, had been previously well——

Mr. Turtur: Pardon me, Doctor, I don't want to interrupt, your Honor, please. I don't think Dr. Pollak can go into the question of the history. He is not the treating physician. He is an examining physician, and as such, can only state what he found and what his opinion is.

The Court: That is the rule.

Mr. Rudner: That doesn't apply where the history of a man is involved in a hospital record. I mean Dr. Pollak testifies that the history he has reference to is history testified to this morning by Dr. Novello.

The Court: Why do you want it again then?

Mr. Turtur: Where did he get it?

The Court: Why do you want it again?

Mr. Rudner: I don't want it again. Dr. Pollak is not testifying to the history. He is merely saying it is based on the history he saw at that time.

[fol. 731] The Court: He cannot base his diagnosis on the history.

Q. All right, eliminate the history, Doctor; eliminate the history from any source. Just tell what you saw and what you diagnosed from that?

A. The diagnosis from our physical examination and X-Rays was a bronchiectasis and a pneumonitis, which is an inflammation subsequent to the bronchiectasis. That is our diagnosis.

Q. What is bronchiectasis, Doctor?

A. Bronchiectasis is a dilatation and inflammation of the bronchial tubes, which is acute chronic, or sub-acute and chronic, and it is usually in the chronic form that we have an opportunity to observe it. Bronchiectasis is caused by many conditions. It is caused by inflammation produced from previous diseases, such as measles, pneumonia, infarcts.

Q. What is that?

A. Well, that is a clot of blood or substance that may get into one of the bronchial tubes, or branches, that causes an occlusion, then forms a nidus for inflammation, and subsequently develops into a bronchiectasis.

Q. What is the distinction between bronchiectasis and a pulmonary abscess?

A. Well, a pulmonary abscess is a gathering or a collection of pus, which is usually limited to one definite area. [fol. 732] I might perhaps draw that.

Q. Will you get some chalk?

The Court: Is there any conflict about this? I thought we were now agreed what the patient had.

Mr. Rudner: No, the other side claims it was an abscess. We claim it was a bronchiectasis.

The Court: I gathered from Mr. Turtur's submission of this book, that he agreed it was bronchiectasis himself.

Mr. Rudner: I don't think so.

The Court: Is that so?

Mr. Turtur: That book, your Honor please, was for my study, to study the subject of bronchiectasis, and also study the subject of lung abscesses, and your Honor will note that in the book it shows the two distinct chapters.

The Court: Well, it says abscess of the lung and bronchiectasis are frequently associated.

Mr. Turtur: That is our contention, yes, sir.

The Court: Now is it possible, Doctor, to determine an abscess to the lung definitely?

The Witness: Yes, sir.

[fol. 733] The Court: How can you? I should think there couldn't be any dispute about that.

The Witness: I think it can be easily demonstrated from the fact that an attempt was made here on four or five occasions to evacuate the abscess, and it was not evacuated.

The Court: To evacuate what?

The Witness: The abscess.

The Court: What does that mean? That is a little complicated.

Mr. Turtur: Well, we are going into something that Dr. Pollack didn't do, and going into something——

The Court: Some other doctor.

Mr. Rudner: Dr. Schilling, this man's attending physician, was not called in this case.

Mr. Turtur: Well, I offered to call the attending physician, but your Honor told me never mind, we had a sufficient amount of physicians. You remember that, your Honor please. I had two of them on.

The Court: If you want to call him, call him.

Mr. Rudner: I am just going to have the doctor eliminate that statement he attempted to make.

[fol. 734] A. I am limiting myself to this particular case picture I saw, and I say that from that picture, I could determine that it was not an abscess, but rather a bronchiectasis, and I attempted to state the reason why I came to that conclusion.

By Mr. Rudner:

Q. Yes, I understand that. Of course, you gathered from the hospital conclusions, but eliminating that, Doctor, and limiting your testimony to your physical examination of this man, whatever history you got from Mr. Matey himself and the X-Rays—now, if you want to use that blackboard that might be of help.

A. I merely could portray what I mean by bronchiectasis, and how a case of bronchiectasis, or this particular case of bronchiectasis, very likely developed.

The Court: Wouldn't a chemical test of the sputum show it right away?

The Witness: No.

The Court: Why not?

The Witness: A chemical test of the sputum would merely —not a chemical test, but a microscopical test would show pus cells there if there was a bronchiectasis, but pus cells might likewise come from the rupture of a small abscess. They both have pus cells.

[fol. 735] The Court: Then what is the definite way of determining an abscess?

The Witness: The definite way is to take X-Ray pictures in all sorts of positions until you definitely locate the abscess, and the definite proof of it is the introduction of trocar and evacuation of pus which is in the abscess space.

The Court: Did you try that?

The Witness: I did not.

Mr. Rudner: He wasn't permitted to try that.

Mr. Turtur: We have a roentgenologist here.

The Court: Well, if the man has an abscess he should be treated for one, in the name of humanity, if for nothing else.

Mr. Turtur: And in the name of humanity the hospital record shows he had an abscess, and the Roentgenologist diagnosed the case as a lung abscess.

Mr. Rudner: Your Honor, counsel refers to the hospital records. I am not referring to it, he is.

The Court: Let's see the hospital record.

Mr. Turtur: I subpoenaed him.

Mr. Rudner: He went home.

The Court: Do they show treatment for an abscess?

Mr. Turtur: Yes, your Honor.

[fol. 736] Mr. Rudner: I never saw them, Dr. Pollak saw them.

The Witness: They show an attempt at treating this abscess. They attempted in four or five or six—I won't be positive, but in a number or places to introduce the trocar for the purpose of evacuating that abscess, and they failed, and it is because of the failure in conjunction with the diagnosis, in conjunction with the foul sputum, in conjunction with the very club finger which the man had, which made us come to the very definite conclusion that this is bronchiectasis with co-existing pneumonitis, that means inflammation of the tissues surrounding it.

The Court: I don't know which is the more serious, as a matter of fact.

The Witness: Well, as the more serious, your Honor, I would prefer the abscess, because I have a chance to have it operated on. A bronchiectasis is usually a chronic thing and is very difficult of treatment, and usually leaves a person invalided and a menace to society, because they carry with them that stinking pus that you can't get out, unless they do a very elaborate operation, which is now in its initial [fol. 737] experimental stage, which means the man has to stand upside down and empty the bronchial space in order to evacuate as much pus as he can. An individual of that kind is an awful menace to society, because the stinking pus is absolutely unbearable.

The Court: In other words, this doctor says that the thing you contend he hasn't got is worse, so I shouldn't think it would make very much difference to you.

Mr. Turtur: It doesn't make any difference to me, except that I can only go by the information I have. That was he has a lung abscess.

The Court: They don't quite say that, if the doctor is now accurate in quoting the medical records.

Mr. Turtur: Well, that is a difference of opinion, your Honor please.

The Court: I don't think we need to spend time over something which is of no consequence.

By Mr. Rudner:

Q. Dr. Pollak, had you given us your complete statement as to your diagnosis?

A. Yes. It is definitely a bronchiectasis with a pneumonitis.

Q. Now, a bronchiectasis takes place in what part of the lungs?

[fol. 738] A. Well, bronchiectasis may take place in any part of the lungs, but usually in the more dependent parts of the lungs, which are at the bases of the lung, the right and left lower lobe, and in this instance, in the right lower lobe.

Q. Could you help us show the position more exactly if you used the blackboard?

A. The trachea comes down here and divides into the bronchus, the right and left bronchus. That divides into the middle bronchus and into the lower bronchi on the right and left side, and these bronchis, the upper, middle and lower, divide like a tree with its branches like a twig, and they form little branches like that all over. If you will please imagine that this is done all over (illustrating), we are dealing here with the right side. Now we found in this case an obstruction or collection of pus in this part of the bronchus, which gradually makes the appearance of bunches of grapes like this, all around, and finally an inflammation occurs, as you saw it in there. The lung tissue around these things becomes involved, and instead of seeing as we saw at the apex, clear lung tissue, we saw obstructed lung tissue, and to the eye, we see the tissue as reflected in the X-Ray, because the X-Ray portrays merely densities found in the lung, where in normal tissue there is nothing discernible, but you will find [fol. 739] on the X-Ray the collar bone, the ribs, the shadow of the heart, which is rather indistinctly shown, because they are dense tissues, the upper part rather clear, but here we find this inflammatory product which makes the view obscure.

The Court: Why are we doing this? I thought we were now agreed that it didn't matter whether it was an abscess or bronchiectasis; it was one or the other, so there was no dispute; so why do we have to have the Doctor explain his diagnosis by X-Ray?

Mr. Rudner: Well, I just thought it might be helpful to get an exact picture.

Q. May I suggest this: The abscess would indicate what on the picture you are drawing?

A. Let's figure out the abscess was on the other side. I haven't room and don't want to draw it again. Usually, by reason of the swallowing of a foreign body, as was admitted this morning, or in tonsillectomy, where a small piece of tissue was swallowed, or sometimes where a coffee seed is swallowed, or sometimes where a pin is swallowed by a child, who puts it in his nose and it finally gets down to the lung, obstructs the lung, causes irritation, and finally an abscess forms, an abscess, let's say, like this condition of pus, which usually occurs two or three weeks after the tonsillectomy or after the foreign body is swallowed, then of course, we can by X-Ray locate this abscess, and if the sur- [fol. 740] geon is competent, he will go in here and put his trocar in there and attempt to evacuate it, and the pus will run out. If the abscess is so deep that he cannot do that, that it is not safe, we do a thoracotomy, cut out this rib, in order to get at the abscess, and evacuate it that way and this is usually—unless it is recognized early—I mean if it is recognized early that is a simple procedure. If it is recognized late, then of course, we get all the inflammatory reactions that we have gotten from any foreign body that may be located in lung tissue or any other tissue.

Q. Now, Doctor, assuming bronchiectasis, what are the causes of bronchiectasis?

Mr. Turtur: He has just been through that, your Honor please.

Mr. Rudner: Some of them, he gave some of them.

A. Well, the causes are primarily an infection which follows diseases, such as measles, pneumonia, or, as I have already stated, blood clots, which may be inspired or inhaled.

Q. Now, measles, of course, are ailments which we have in childhood?

A. Yes.

Q. How can they give an adult bronchiectasis?

Mr. Turtur: I object to that, your Honor please, because [fol. 741] pages 94-95 of the testimony distinctly show that this gentleman had none of these childhood diseases.

Mr. Rudner: And the history this morning, as given by Dr. Novello, was that he did have diseases.

Mr. Turtur: And the history as given by Dr. Novello, which he says he got with some difficulty here, is the testimony of the gentleman, where there was cross-examination on pages 94 and 95, and it distinctly shows, your Honor please, where Mr. Rudner asked this question: "Do you remember any sickness you had when you were a child? A. No, I have no sickness, my mother said——"

"Never mind that. What do you know about it? A. That is all what I know, what I remember, I never was sick."

The Court: What page is that?

Mr. Turtur: Page 95, sir.

"Did you have chicken pox or small pox? A. No."

"You started to work for the Grasselli October 28, 1928? A. Yes."

Mr. Rudner: What page is that?

Mr. Turtur: Page 95, and also 94.

[fol. 742] The Court: What are we wrangling about now?

Mr. Turtur: Well, he wants to put measles in the case now.

Mr. Rudner: On page 94 I asked Mr. Matey: "When you were a child did you have the measles? A. I don't remember."

The Court: You don't mean you could have measles at five years of age and have this disease at 45?

The Witness: It can follow it, yes, sir.

The Court: In forty years?

The Witness: There may be an inflammatory process there which may be latent and may be superinduced by something else that occurs to an individual later on in life, but it is usually due to pneumonia, to tuberculosis and to some of other diseases that we meet with commonly; in fact, bronchiectasis is very often confounded with tuberculosis and very often is co-existing with tuberculosis.

The Court: What is pertussis?

The Witness: Pertussis is whooping cough. Now it would be possible to follow whooping cough, because severe coughing stretches the bronchioles and bronchial tubes, and [fol. 743] may cause an inflammation and cause a bronchiectasis, which perhaps will never present itself symptomatically, because it is a dry bronchiectasis. We all have had numberless cases of dry bronchiectasis.

The Court: Can it follow a cough?

The Witness: It may. It very often follows the grippe.

The Court: Can it follow a tooth extraction?

The Witness: No, sir; a tooth extraction, if it followed that, it is usually referred to as a foreign body and that usually causes an abscess. That is what the gentleman referred to this morning when he spoke of the one case of a foreign body. When we speak of a foreign body, we mean that kind of foreign body, a tooth or a piece of tissue.

Mr. Turtur: I think that should be stricken. How can Dr. Pollak give what the other gentleman meant? A foreign body also means a chemical.

The Court: The other gentleman read it from your book.

Mr. Turtur: I think it was Dr. McCallion.

The Court: I think I asked him about it, but the word foreign body came from your book. I asked Dr. McCallion about it.

Q. Does a foreign body mean a chemical?

A. Not from my knowledge.

[fol. 744] Q. What is a foreign body?

A. A foreign body is something that is foreign to that particular part of the anatomy where it is found.

The Court: The only foreign body given in Mr. Turtur's book is a blade of grass, which appears on page 111. The other two foreign body cases are just unmentioned.

Q. Now, have you given us all the possible causes of bronchiectasis?

A. Yes.

The Court: Well, you can't have done that, because here is a list of them.

The Witness: Well, I can go specifically into all the diseases, if you want me to.

Mr. Turtur: I think the Doctor ought to give them without reference to the book, your Honor please.

The Witness: I don't want to use the book.

The Court: There are 200 pages in your book that have various causes. Now do you want to ask the Doctor if those can be the various causes?

Mr. Turtur: No, I am not referring to the book, your Honor please. He is now attacking the book. I say the Doctor himself ought to give whatever testimony he wants without reference to the book.

[fol. 745] The Witness: Your Honor, I don't have to refer to any book.

Mr. Turtur: I know you don't.

Q. Go on, Doctor, give the causes.

A. I have given you the most important causes.

The Court: I could do it this way to save time—"Could it be caused by," and then I could read all the cases of these 240.

The Witness: I would be very glad to answer.

The Court: I will read——

The Witness: Whooping cough, that may cause it.

The Court: Asthmatic bronchitis?

The Witness: That is very common.

The Court: Syphillis?

The Witness: I never heard of it.

The Court: There are three cases of that in this list. Tonsillectomy?

The Witness: Oh, very frequently, sir.

The Court: Post-gastrotomy, whatever that is.

The Witness: That is an operation for the stitching together of the stomach and intestine. That may be so, but I think you will find there are very few cases. I never heard of it.

[fol. 746] The Court: One case in this list—spirochetosis?

The Witness: Well, that is a condition, lung condition, caused by the spirochete, which is an organism, but that may be a condition co-existing, and the differential diagnosis between the two is very difficult, except that the stinking pus is about the same, but spirochetosis may be treated with anti-syphillitic remedies and cured.

The Court: Anthracosis?

The Witness: Anthracosis, no sir.

Mr. Turtur: Your Honor please, so that we don't confuse it, may I note it, please, that there is no syphillis involved in this case.

The Court: Oh, certainly not, no one said there was. Well, that's all the causes that appear in this list other than the ones that the Doctor had already mentioned.

By Mr. Rudner:

Now, Doctor, assuming a lung abscess, what are the causes of a lung abscess?

A. A lung abscess is, of course, usually due to an inflammation of the parenchyma of the lung, that is the lung substance itself. I spoke here about bronchial tubes, and here we are talking about the parenchyma of the lung itself. That is inflamed, and due to certain causes, abscessed by [fol. 747] various organisms, some 80 or 90 organisms may cause the infection. It is very usually produced by foreign bodies, such as we have already refered to, tonsilar tissue, foreign bodies of any other kind. Very frequently we find a story that a man had gone to a dentist and they don't know what became of the tooth, and two weeks after he developed a severe pain, and he had an abscess. That is a very common reason for it, and another very common reason is tonsillectomy, a piece of the tonsillar structure, instead of being sucked up by the suction apparatus, is inadvertently swallowed. That sets up an infection and causes an abscess.

Q. Now in the case of Mr. Matey, having reference to your diagnosis of bronchiectasis, can you tell us what caused it?

A. I can give you my idea what caused it.

Q. What do you think, what is your idea?

Mr. Turtur: I object to that.

The Court: He can give his opinion.

A. I just give you my best opinion. There may be a dozen other causes, none of them are definite, but this seems the most logical thing. The gentleman had an operation in which gas-ether anaesthesia was used. The results of the operation were satisfactory. The examination of his chest was clear, definitely stated that it was a resonant note found in the lung.

[fol. 748] Mr. Turtur: I ask that this be stricken, as that is history, and depending on something else other than what the Doctor knows. I object to it, please.

The Court: Go ahead.

The Witness: I beg pardon?

The Court: Tell us why you think from your own examination, not from something else that happened.

The Witness: Well, your Honor, on an examination of the patient, we cannot just by touching and listening to the man get the evidence that we desire in making a diagnosis. We have the history, and in a hospital they are always presented to us, and we have the X-Rays, and the three—and the chemical analysis or the urinary analysis, and all that form a basis around which we make a diagnosis, and if we are to deliver an opinion, we have to have a complete——

The Court: You had better get those cases out, Mr. Rudner, that is another foolish rule.

Q. Well, suppose we assume, Doctor, that when this man was operated on on June 14, 1934, he went to the Alexian Brothers Hospital in Elizabeth, where he was examined by Dr. Novello, the then house resident, and that he presented [fol. 749] a history of having as a child had measles and perhaps one or two minor ailments, and that upon being examined in June, 1934, the doctor found no rales in his lungs, found no chest condition, and that he was thereupon operated. He was at the hospital about seventeen days. The operation was successful; and that he then went home; that three days thereafter he developed this excessive coughing. Now, taking those facts into consideration, taking into consideration your physical examination of this man, and taking into consideration the examination that you made of these X-Rays, and the findings which you have made, tell me then your best opinion in your judgment of what caused this man's condition.

Mr. Turtur: I object to the question, your Honor please, in that all of the facts in the hypothesis have not been given.

The Court: What facts?

Mr. Turtur: The prior working conditions of this man, how he was subjected to all these things all through life. He has been working every day without any complaint, went there in 1928, and was perfectly healthy.

Mr. Rudner: I can make my own hypothetical question.

Mr. Turtur: Well, let him read my hypothetical question.

[fol. 750] Mr. Rudner: I don't agree with your statement.

Mr. Turtur: Everything is in the hypothetical question that the evidence brought out, your Honor please.

Mr. Rudner: I am not going to assume it is true, what he put in the hypothetical question. We deny all the dust.

Mr. Turtur: Well, they proved it with records and otherwise.

Mr. Rudner: Our witnesses haven't got on the stand yet.

Mr. Turtur: Well, I object to the question, your Honor please, on the ground that the full facts in the hypothesis have not been given.

Mr. Rudner: Counsel cannot control my hypothetical question.

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. I come to the conclusion that this man's bronchiectasis was caused by the ether anaesthesia.

Q. By what?

[fol. 751] A. By reason of the anaesthesia, which is a logical conclusion, and that the swallowing of infected material due to the anaesthesia entering into his bronchial tree, caused there an obstruction somewheres, and in the obstruction started up a bronchiectasis, which developed and gave rise to the condition that we found.

Q. Now, Doctor, what has been your experience in industrial dust cases involving inhalation of various dusts? Have you had experience along those lines?

A. I have seen any number of cases of pneumonoconiosis and silicosis.

Q. Now Doctor, describe to the court and jury the physical processes of inhaling any dust, regardless of the kind, how it goes into your system by mouth, and so forth.

A. Well, dust, of course, is inhaled by means of the nasal orifice and the mouth. It gets down in the windpipe through the bronchi, and is distributed equally on both sides of the lung, right and left, upper and lower, or the lower parts of the bronchial tree, and as such, if it is a harmless dust, which most of the dusts are, it will not visualize itself, not cause any symptomology. If it is a dust which is laden with silicate, silicon, rather, then we get certin typical formations, reactions of the body in the lung to this dust, which manifests itself very plainly on the X-Ray, and the [fol. 752] X-Rays are a great ally in diagnosing these dust conditions. We find these dust conditions due to iron dust where we call it siderosis; we find it due to coal dust, as we find it in the miners of Pennsylvania and West Virginia, we call it anthracosis, and we call the dust condition pneumonoconiosis from the Latin name meaning air and conium meaning dust.

Q. These conditions, are they readily observable from the X-Rays?

A. Yes.

Q. Now, having regard to the X-Rays which you examined today, is there any suggestion from those X-Rays as regards dust condition?

A. There is no evidence whatever of any dust condition.

Q. Now, you said something about dust being equally distributed in the lungs, what do you mean by that?

A. Well, if dust is inhaled, and gets down into the respiratory tract, it always distributes itself equally. There is no condition that would do otherwise. If you blow a dust into the lung or inhale it, with the inhalation it spreads itself through the various branches of the bronchial tree.

Q. Well, can dust be inhaled and go to one part of the lung, and not to the other part?

A. I never saw it and I cannot think it possible.

Q. Assuming of course without admitting, assuming for [fol. 753] the purposes of argument, and giving your opinion, the inhalation of some dust which is corrosive, what is the effect on the system, the respiratory organs, lungs and other respiratory organs, of inhalation of such dust?

Mr. Turtur: I object to such questions, because he says it is for the purpose of argument.

The Court: He may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. The inhalation of corrosive dust, which we can only conjecture upon, because corrosive dust, if it would come into our nostrils and deposit itself in our mouth, let us say, it would cause there immediately a reaction, and if it was sufficiently corrosive the man would of course, or the woman that may be subjected to it, would expectorate it, it wouldn't get down to the lung at all. I don't see how it can get down there.

Q. Well, can it come into the nostrils?

A. It can come into the nostrils, but immediately as it comes into the nostrils it becomes an irritant and causes certain inflammatory processes, and there are certain corrosive substances such as the workers in chrome, for instance, when they inhale chrome they have a particular [fol. 754] kind of a manifestation of irritation, they all develop what we call nasal ulcers. The septum of the nose ulcerates; but otherwise there is no manifestation. I cannot conjecture any corrosive dust getting into the lung.

Q. Why.

A. Because it wouldn't get down there. The man or the woman certainly would not stand or permit corrosive dust to get into the lung. If he would get the first mouthful of it he would feel it and he would throw it out. A man gets, for instance, a little iodine in his mouth, or a very minute amount of carbolic acid in his mouth, or any of these corrosive articles, he doesn't swallow it unless he does it for suicidal purposes, it doesn't get any further. And if a man were to get dust into his lung or a corrosive nature, it certainly would manifest itself in other ways. If it were possible, it would first manifest itself in the buccal or the mouth cavity.

Q. In what respect, what would happen there?

A. He would perhaps swallow it, and as a result of his swallowing it, unless there is unconscious inflammatory contraction that it would not go down, he would be sick, he would vomit, he would have a diarrhea. If a man would have these conditions of dust you refer to, he certainly [fol. 755] would have symptomatic, definitely symptomatic demonstration. He would have diarrhea all the time, because you cannot swallow—even if you take bicarbonate of soda and take it for a long time, inoffensive as bicarbonate of soda is, which is here referred to as $NaHCO_3$——

Mr. Turtur: Your Honor, we are going far afield.

Q. Go ahead, Doctor.

A. That is bicarbonate of soda in small doses, and as a laxative you can imagine what large, perpetual, constant, continual absorption of such a thing would be, it would be nothing but gastrointestinal upset, and the person, regardless of who he may be, would not continue to work in such an atmosphere. It is impossible to conjecture it, and particularly referring it to this particular case that I have examined.

The Court: What about the theory of coughing, Doctor?

The Witness: The theory of coughing, the cough, sir, is the resultant response or reaction to some irritation. For instance, the sputum lies in the bronchial tube. It irritates the nerve tendril, and it is nature's effort to dislodge that sputum that brings it up.

The Court: Will coughing bring on bronchiectasis?

[fol. 756] The Witness: Well, I cannot conjecture it, except indirectly, but coughing might, as you can readily understand, bring on a condition,—let us say, for instance, a man blows a trombone, one of these fellows that blows a horn constantly, he will bring about in the parenchyma of the lung a forcible dilatation of his lung, which we call emphysema. Then the lung tissues would be below par, and as a result of that, he may develop any of the infectious processes to which the lung is heir to. Furthermore, let me devolop this thought, which I think is perhaps pertinent to the question: If we have in our eye a foreign body, a splinter, whatever it may be, immediately by its presence, it causes an irritation. That is the result of the foreign body. That foreign body then continues to irritate, and we have congestion, pain, because of pressure on the nerve and tearing, and that process continues until the foreign body is taken away. Now the conjunctiva, or lining membrane of the eye, is the same kind of substance as the mucous membrane from the mouth to the anus, and it, too, would respond to a foreign body as an irritant and as an irritant, it would produce logical sequence. I mean if he swallowed something which was a foreign body in the in-[fol. 757] testinal tract, why, the logical thing is we have a diarrhea, and if the diarrhea continues, just as the foreign body causes the tear and irritation, here the foreign body from the mouth to anus in the intestinal tract, causes that.

By Mr. Rudner:

Q. Upon the inhalation of dust, Doctor, is there any percentage which is swallowed as against the percentage which is inhaled in the nostrils?

Mr. Turtur: Well, that is too general, your Honor please. I object to the question.

The Court: He may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. Well, I couldn't definitely answer how much. I go through the streets, I don't know how much dust I inhale, nor do I know how much of that dust I inhale goes into the lung, or how much I expectorate subsequently.

Q. But there is some portion that goes into the mouth in any event?

A. Most of it goes into the mouth, because it comes there first, even though it might come into the nose.

[fol. 758] The Court: Doctor, what is the reason for silicosis and anthracosis?

The Witness: Well, sir——

The Court: I know the answer, because I had one of them, but the jury, I think, would like to know.

The Witness: Silicosis, the effect upon the lung, or anthracosis—but silicosis in particular,—silicate causes the elastic lung tissue to be irritated by this silica, and eventually the elastic lung tissue, in brief, becomes fibrous tissue, fibrous tissue, that is, instead of being soft and elastic, it is hard because of the deposits of this silicate, and for that reason, the man cannot breathe well, he gets short of breath, dyspnea, and furthermore, we find that in a great percentage of the cases,. variously estimated by various commissions, and there are some very important studies now being made, both at Guiana and in Wales, it is found that from 40 to 70 per cent in various parts of the world develop tuberculosis as a result of the silicosis.

The Court: It is an entirely different disease of the lungs from bronchiectasis?

The Witness: Oh, absolutely, that is an entirely different subject.

[fol. 759] —. Aren't there some dusts which are inhaled which are beneficial to the lungs?

A. Well, in an indirect way I would say so. For instance, we used to say that in the war we used to speak of chlorine, for instance, as being prejudicial, and yet we find now that latterly, since the war, we have introduced chlorine as a treatment——

Mr. Turtur: Your Honor, are we going to go into this indefinitely with chlorine and mustard gas?

The Court: I mean with respect to dust.

Mr. Turtur: We have gone into silicosis and everything else. I object.

Mr. Rudner: That was in response to the Court's question, sir.

By Mr. Rudner:

Q. I am limiting my question to dusts, any kind of dust.

Mr. Turtur: I think the dusts that ought to be referred to are inorganic dusts only that this man was subjected to.

Q. Doctor, this man worked around soda ash, phosphate powder, phosphate and metasilicate powder, have you ever heard of a man in your experience, examinations or readings, who acquired bronchiectasis from the inhalation of soda ash, or phosphate, or metasilicate?
[fol. 760] A. Never, and there is no——

Mr. Turtur: I object to the question, unless the Doctor is also given the fact that they are inorganic substances.
The Court: Add that.

Q. They are inorganic substances?

A. I know that they are inorganic substances, all chemicals of that sort are inorganic.

Q. All right, so what is your answer?

A. I have never heard of it, and there is no such case on record. I have tried to get the literature, and found no cases.

Q. Well, of course, that doesn't say that there might not be some book produced by somebody who found a case. You have never heard of one?

A. I never heard of one.

Q. Do you know anything about the chemical processes of soda ash, phosphate?

A. I don't know very much about chemistry. I do know something about chemistry, but I don't want to subject myself to an examination on my knowledge of chemistry.

Mr. Turtur: I am getting ready, Doctor.

The Witness: Thank you. I might teach you something.

Mr. Turtur: Thank you. I expect to learn.

Q. Is it possible, Doctor, for a corrosive dust to be [fol. 761] inhaled and to have an effect upon the lung?

A. I cannot conjecture of a corrosive dust to be inhaled.

Q. Why?

A. Because as soon as——

Mr. Turtur: This is a caustic dust, your Honor please, and not a corrosive dust.

The Court: There isn't any difference at all according to your expert.

Mr. Turtur: Well, if it is caustic and corrosive, then I withdraw my objection.

The Court: Yes.

A. Well, supposing you permit me to answer this question by asking one. I cannot conceive how any individual would take in corrosive or caustic dust when it has become so irritating upon its entrance into the mouth, and continue to subject himself to such a process. I cannot conjecture it, I don't believe it is possible.

Q. Why isn't it possible?

Mr. Turtur: I ask that that be stricken as to the opinion of the Doctor, as to why a man does certain things. I think the Doctor ought to be told some of the other factors in this case before he renders any personal opinion. We are not interested in personal opinions; we are interested in medical opinions. I ask that that be stricken.

[fol. 762] Mr. Rudner: Oh, I think the Doctor is giving his answer and explaining it.

The Court: Motion denied. You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Doctor, why do you say that assuming a corrosive dust, why can't it be inhaled into the lung? Why do you say that?

A. Well, if any substance is corrosive enough to cause damage, it is either in mild form, such a mild form, that it is actually not corrosive; but if it is corrosive, for instance, like inhalation of ammonia—oh, please——

Q. Go ahead, Doctor.

Mr. Turtur: I am trying to get your answer, Doctor.

The Witness: I am trying to give it to you.

Mr. Rudner: Don't interrupt the Doctor. You will get it.

Mr. Turtur: I am not interrupting.

A. (Continuing.) —that a man subjected to something that would be injurious to him, he certainly would not continue to inhale such a thing. He will take one breath of it and he cannot take any more, he will get out.

[fol. 763] Mr. Turtur: Now I ask that that be stricken again, your Honor please, on the ground it is a conclusion of the Doctor and the Doctor's personal opinion as to what a man should do or should not do.

Mr. Rudner: No, the Doctor is saying that it affects a man so that he must stop at the moment of the inhalation.

The Witness: Yes, sir.

Q. How would an individual——

The Court: Average individual——

Mr. Rudner: Beg pardon, sir?

The Court: Average individual.

Q. Yes, how would an average individual respond to the inhalation of such a corrosive substance?

A. He would respond depending on the amount of supposed corrosive stuff that he would inhale, he would be sick, he would vomit. How can one conjecture a man taking in any gas or any foreign body without developing symptoms? It is impossible, sir. It cannot be done.

Q. How quick would those symptoms develop?

A. Immediately.

Q. When you say immediately, what do you mean in terms of time?

A. I mean as soon as you come to inhale injurious substances a man would quit because of the effect it would [fol. 764] have on his body.

Q. What effect would it have?

A. Vomiting, and the swallowing of it would give him diarrhea. It is an irritant, it is logical.

Q. Would that be the result over a period of time, or almost spontaneous?

A. It depends on how long you subject him to it, but I cannot see how an individual could be subjected to such a thing over a period of time.

Q. Could an individual be subjected to it for a month?

A. I don't believe he could, not to a corrosive substance.

Q. He couldn't stay there for a minute?

The Court: You mean without showing certain symptoms?

Mr. Rudner: Yes.

The Court: You are not trying to say what the endurance of a particular individual is, but the average.

Mr. Rudner: The average man, yes.

Mr. Turtur: Now, Mr. Rudner, don't mislead him.

Q. Limit ourselves to the average man, Doctor.

The Court: No, limit yourself to what symptoms would [fol. 765] be indicated if he did it.

A. I said vomiting and diarrhea.

Q. What would be the minimum time that that average man could work under those conditions with this corrosive dust?

The Court: Without showing the symptoms.

A. That I cannot say what the minimum time is. A man may work an hour, a man may work two hours, but I cannot say how long he might go, no one can say that.

Q. Could you give us about the maximum time?

The Court: No, because some people may be so constituted that they don't mind vomiting.

Mr. Turtur: In our case he didn't vomit, your Honor.

Q. Doctor, Mr. Matey, in October, 1933, had a chest expansion of about three inches, what would that indicate to you?

Mr. Turtur: Your Honor please, I object to that.

The Court: It is normal. I want to ask you this Doctor: When he was examined, Matey, in the hospital, if he had had this bronchiectasis, could that have appeared from any examination other than an X-Ray?

The Witness: That is the only one, because he showed early, only early signs; therefore, they were not demon-[fol. 766] strable by an ordinary physical examination.

The Court: You agree with Dr. McCallion. What has the chest expansion to do with it?

Mr. Rudner: Very important. I think it has a certain relevancy.

The Court: If he has a normal chest expansion has that anything to do with his bronchiectasis?

The Witness: No, not under the conditions, if he has a normal condition.

Cross-examination.

By Mr. Turtur:

Q. Doctor, what is the difference between corrosive and caustic?

A. I don't know any difference. To my mind they are the same.

Q. The same thing?

A. Yes, sir.

The Court: Also in the mind of your expert.

Mr. Turtur: I didn't hear your Honor.

The Court: Also to the mind of Dr. Gettler they are the same thing.

Mr. Turtur: Well——

The Court: That was his testimony, so I assume——

[fol. 767] Mr. Turtur: Don't materials become corrosive after being caustic?

The Court: His testimony was——

Mr. Turtur: That is what I understood it to be, your Honor, that is the reason I asked the question, not for the purpose of repetition.

Q. Now, Doctor, in order to have vomiting and diarrhea —you see I want to learn——

A. I will be glad to teach you, sir.

Q. Thank you sir—isn't it necessary, sir, that they must be taken in through the medium of the stomach?

A. Yes, sir, but it must get into the stomach.

Q. Yes.

A. That is through the mouth, and that is the upper part of the respiratory system.

Q. Yes. This was not swallowed, these chemicals, you know.

A. How do you know that they weren't?

Q. I say they were not swallowed. That is the evidence so far. They were inhaled.

A. But in the inhalation of a substance certain particles of the substance, and the majority of it gets into the mouth, which is the upper part of the respiratory tract, and no possible imagination can keep it out of the gastro-intestinal tract.

[fol. 768] Q. Now you don't know what amount——

A. Well, I do know.

Q. (Continuing.) —goes into his stomach and what goes into the respiratory tract.

A. I do not try to tell you that; I told you that before. When counsel asked me how much was in the mouth, how much in the nose, I told him I didn't know.

Q. Yes, the devastating effect is quicker by swallowing than by inhalation, isn't that so?

A. It depends on the substance that is swallowed.

Q. Well, the substance that is swallowed, Doctor, is an irritating chemical substance over a long period of time, an inorganic substance, that is the subject I am talking about, and which is an alkali.

A. Yes, sir; what is it you want to know about this alkali?

Q. About the whole effects that I just gave you.

A. Give us something definite, some bicarbonate of soda, bismuth of nitrate, corrosive sublimate, carbolic acid, or what? They are all chemicals of inorganic substances.

Q. I am talking about soda ash, phosphate of soda, silicate and other caustics.

Mr. Rudner: Now, if your Honor please, there has been no analysis of silicate, no suggestion of silicate, having played any part in this case. That is insoluble.

[fol. 769] The Court: You are not contending that at this late stage, are you, Mr. Rudner?

Mr. Rudner: You are not contending that silicate——

Mr. Turtur: Metasilicate.

Mr. Rudner: Excuse me, that's all right.

A. Well, I have seen, and I have given plenty of soda phosphate to patients to move their bowels as a laxative. They have taken it, sir, and haven't had any deleterious effect from it. Thousands of people take phosphate of soda, and they don't inhale it.

Q. We are not talking about sodium phosphate.

A. You mentioned it as one.

Q. I said phosphate of soda.

A. What's the difference?

Q. I don't know, I am asking you.

A. It is the same thing. The metal natrum, Na plus sodium—whether the phosphate comes first or last, it is still phosphate of soda or sodium phosphate. It is the same thing.

Q. How about carbonate of soda, is that the same thing?

A. No, that is CO_3. Now a chair is not the same thing as a table, and they are both made out of wood.

The Court: A lawyer is not the same as a doctor.

[fol. 770] The Witness: No, sir.

Mr. Turtur: I will say they are not the same, the Doctor ought to have been the lawyer.

The Witness: That's what they tell me, sir.

Mr. Turtur: Or a political speaker.

The Witness: I do that occasionally.

Mr. Rudner: Now no comments.

Mr. Turtur: Don't you like it, Mr. Rudner?

Q. Now, Doctor—just pardon me a moment, Doctor. On the question of the carbonate of soda what was it you said about that?

A. What was it you said about it? I said that carbonate of soda, if I remember it in my high school days, 50 years ago, $NaHCO_3$, when it gets into the mouth comes in contact with hydrogen, and now I am not a chemist, and forms an acid, carbonate of soda, ordinarily known as bicarbonate of soda. Now don't try to get any text books, because I am not going to answer you, because I don't know anything about chemistry. Bicarbonate of soda I know something about.

Q. What did you say the chemical formula was?

A. $NaHCO_3$. I learned it 48 or 50 years ago.

Q. Now, Doctor, where would the infected material come from in order to give an infection to a lung?

A. A man has a mouthful of rotten teeth, as this man has, certainly had plenty of stuff to get it from.

[fol. 771] Q. I am talking about an operation, Doctor.

A. I am talking about a man.

Q. Now, Doctor, please, I am talking about an operation.

A. Yes, and I am talking about a man who was operated on.

Q. Pardon me, Doctor, let me say to you, please, that I want to be very respectful to you.

A. Thank you.

Q. You deserve respect. I recognize you as a gentleman learned in your profession, and I will appreciate it if you will just please answer my question.

A. I will do that, sir.

Q. Yes, sir, and I say this with a great deal of respect.

A. Thank you.

Q. You are talking about causes.

A. Yes, sir.

Q. This man was operated on for a hernia.

A. Yes, sir.

Q. You know that, Doctor, don't you?

A. Yes, sir.

Q. This was not a tonsillectomy operation?

A. No, sir.

Q. In view of the fact that this was not a tonsillectomy operation, where would the infected material come from to [fol. 772] be deposited upon the lung?

A. Well, whether it was deposited upon the lung or not, we are speaking here of a man that was operated on, who was for the time being, unconscious of what he was doing. He received ether, which is quite an irritant, and as a result of that irritant, there is produced always an excessive amount of salivation, which is in the mouth, and the teeth are in the mouth, and his are poor, his teeth are poor, and that would be a very easy thing for him to have done, I mean to have it happen that some of this infected secretion may have gotten down, but it is the easiest thing in the world, and it happens so often that patients who receive inhalations of ether develop infections. Pneumonia is a very common infection after an anaesthesia.

Q. Doesn't the pneumonia and these other conditions develop immediately after the operation, and not at any later than 48 hours thereafter, and not 20 days thereafter?

A. Oh, pneumonia has been known to develop in three or four days.

The Court: Ten days, to be accurate.

Mr. Turtur: Ten days as to what, your Honor?

The Court: Between the time of the operation and the appearance at the hospital of this.

Mr. Turtur: No, no, your Honor, he was in the hospital [fol. 773] 17 days, and then home 3 days, and then was the first time that the sputum came.

A. All right, sir. That is very simple. There are all kinds of micro organisms which develop—a child goes into school, sits next to a child with diphtheria, you have to wait 20 days for that diphtheria to develop; another man has another micrococcus, swallows it, it takes a certain time to develop it before it presents itself, a most ordinary thing.

Q. Are these germs like diphtheria that develop in that lung?

A. Oh, no, I am only giving you a common example.

Q. I am talking about this case.

A. And I am answering about this case.

Q. I am talking about a lung abscess or bronchiectasis.

A. Pardon me, I am talking about the possibility of being infected by an infected organism which may be a staphylococcus.

Mr. Turtur: Your Honor please, must I go through this cross-examination? I apply to the Court to put some stop to this.

The Court: I would like to put a stop to all of it.

Mr. Turtur: I would like to too.

Mr. Rudner: I am perfectly willing, sir.

[fol. 774] Mr. Turtur: I know you are now.

The Court: I mean both from you and——

Mr. Turtur: Well, your Honor, I certainly have a right to cross-examine, but every time I ask a question, I don't want to go into the question of the why the earth was made, or how it was created. He can give direct answers, your Honor please.

The Court: Proceed.

A. I have attempted to tell you, sir.

Q. Well, now, please, Doctor, there is no question pending, don't be so anxious, and please answer my questions, I will appreciate it. Now you say you can see a dust condition in an X-Ray——

A. If it becomes manifest by reason of its aggravation of lung tissue, yes, sir.

Q. You are talking about a silica dust, aren't you?

A. I am talking about any aggravation of disease. I could talk about a pneumonoconiosis, anthracosis, which is not silicosis——

Q. Have you ever been subjected, Doctor, to this chemical dust of soda ash?

A. No, sir, I have not; as far as I know, I may be breathing it in now.

Q. You have never been at the Grasselli Chemical Com-
[fol. 775] pany, have you?

A. No, sir.

Q. You have never been in any factory where this soda ash is manufactured and been subjected to it when it is popping from the furnace and comes to where you were?

A. I don't know, I have been in many chemical factories in fact.

Mr. Turtur: I didn't ask him that, your Honor please. My question is as to the soda ash, and on this particular chemical. We have gone far afield again.

The Court: I never heard of examining an expert on the reactions in his own body to the things he has testified to.

Mr. Turtur: Well, your Honor, he has gone far afield, has given us all kinds of answers. I tried to make notes of them.

The Court: What has that to do with his opinion as an expert? Of course he hasn't tried the experiment on his own body.

Mr. Turtur: He said something about a man vomiting after an inhalation.

The Court: He is giving his medical opinion, not his personal experience.

Q. The first mouthful you said, Doctor, causes sneezing [fol. 776] and coughing?

A. Mouthful, no.

Q. Well, the first inhalation?

A. Probably causes sneezing. I haven't used the word sneezing during my whole argument.

Q. You did not?

A. No, sir.

Q. Well, would it cause sneezing and coughing?

A. If it be an irritant to the nose, yes, sir.

Q. And if upon an inspection of the factory, a person was subjected—all right, I withdraw that. Coughing is the result of irritation, isn't it, Doctor?

A. Sometimes—sometimes—yes.

Q. Yes. Abscesses, Doctor, are only in the parenchyma*ma* of the lung?

A. Parenchyma.

Q. Pardon me for the mispronunciation.

A. That's all right, I didn't know what you were referring to.

Q. Abscesses are only in the parenchyma of the lung, isn't it so?

A. Are in the lung structure, yes, sir.

Q. And is that where you find the lung abscess?

A. Yes, sir.

Q. And isn't that where this lung abscess is?

A. I attempted to tell you, sir, that because of the cloudi- [fol. 777] ness there——

Q. Your answer is no, Doctor?

A. No.

Q. That's all, no speeches.

A. Thank you.

Q. You know, Doctor, that what we are talking about is an inorganic dust?

A. Yes, sir.

A. An inorganic dust you say cannot be breathed into the lungs, am I correct?

A. If it is objectionable to the system, if it is irritating to the system, no. An inorganic dust which is not palpable, which a person does not experience it is manifesting itself by reason of irritating qualities, may be breathed in, but something that is of an injurious caustic or corrosive nature that you speak of, cannot be inhaled.

Q. Cannot be inhaled?

A. No, sir.

Q. Well, how does anthracite and silicate, Doctor, inhale and go to the lung?

A. My dear, sir, silicate and anthracite manifest their injurious qualities 15 and 17 years after they have been inhaled. As a matter——

Q. Yes, now after that, Doctor, that voluntary explanation——

[fol. 778] A. Yes, sir.

Q. —will you be so kind as to answer my question?

A. How—I have already spoken of that, that it causes a fibrosis which destroys the elastic tissue.

Q. That isn't the question.

A. Well, sir, that is the only way that silicosis manifests itself.

Q. I didn't ask you about silicosis, did I?

A. You did speak of silicosis and anthracosis just a second ago when you asked me how they manifested themselves.

Q. And you talked about the inhalation of the dust, Doctor, did you not?

A. Yes, sir.

Q. Well, that is what I am speaking about.

A. But you mentioned specifically silicosis and anthracosis just a minute ago.

Mr. Turtur: So that there will be no misunderstanding, your Honor, may I have Mrs. Bergen read my question?

The Court: Don't read any more. Proceed.

Q. Now will you give an answer to the question, please?

A. I have already given it to you.

Q. All right. No argument then. Now, Doctor, do you have a pus condition in both a bronchiectasis and a lung abscess?

[fol. 779] The Court: Counsel, are you going to waste any more of our time talking about an abscess when the other side's doctors have given you a diagnosis that is more favorable to you than your own?

Mr. Turtur: All right.

Q. Now, Doctor, isn't it true, that considerable damage can be done to the lungs over a long period of time as a result of constant inhalation of dust, inorganic dusts, before the person necessarily has any symptons of it?

A. No, it cannot be injurious to a person who hasn't any knowledge of it.

Q. What was your answer?

A. It cannot be serious for the patient, be injurious to the patient, and he not have any knowledge of it.

Q. Well, isn't that true, Doctor, that many, many patients have been continuously subjected to inorganic dusts, and often are unaware of any trouble with his lungs until he meets with some minor, or meets with some accident of some kind, and then of a sudden he gets a hemorrhage from his lungs, or suddenly finds himself so breathless that he is incapacitated for work?

A. You are reading of silicosis now?

A. No, sir, I am reading about this dust condition, inorganic dusts.

[fol. 780] The Court: Was that question from some piece of literature?

Mr. Turtur: That question, your Honor please, is something that I am now reading from.

The Court: Well, will you disclose to the court and jury what you are reading from?

Mr. Turtur: I am reading from the State of New York Department of Labor a bulletin, a study of 15 cases of silicosis from the standpoint of compensation. However, it refers, your Honor please, not to silicosis, but to general dust conditions.

The Court: The Doctor explained to the jury, and I think it is conceded to be the fact that silicosis is an entirely different thing, operating in a different manner——

The Witness: That is true, sir.

The Court: —with different symptoms and different effects.

Mr. Turtur: I am not asking him about silicosis. I am asking a general question.

The Court: Well, literature with reference to silicosis is irrelevant. So please don't waste our time and burden the record with literature that is irrelevant.

Mr. Turtur: Does your Honor want to read this for half [fol. 781] a moment, where I have it underlined?

The Court: I have read that pamphlet several times. I am quite an authority.

Mr. Turtur: I appreciate your Honor is. I say this has nothing to do with silicosis. This refers to damage to the lungs over a long period of time.

The Court: In silicosis cases.

Q. Now, Doctor, isn't it true that one of the most frequent causes of bronchiectasis is the prolonged exposure to inorganic dusts?

A. I have never known of that in my life.

Q. Do you recognize as authorities, Graham, Singer and Ballon?

A. If you will tell me in what particular, I will say this, Graham and Singer, both of them I know, who are from St. Louis, have recently written this book, and there are in that book a good many statements which probably are dependable and reliable, but I would not recognize them as my authority, because my authority is my own experience and not anybody's book.

Q. You don't recognize them then as such experts?

The Court: Have you any books which refer to this kind of effect of dust conditions?

Mr. Turtur: I beg your pardon, I didn't hear you.

[fol. 782] (The reporter repeated the court's question.)

Mr. Turtur: This refers to inorganic dusts.

The Court: As producing this particular disease?

Mr. Turtur: Bronchiectasis, certainly, your Honor.

The Court: Let me see it. If that is the one we had this morning, I don't think so.

Mr. Turtur: I will show you the particular sentence on it.

The Court: Just what I thought. You have it mixed up, I think. What sentence are you referring to?

Mr. Turtur: Right here, sir.

The Court: Well, that is a quotation from someone else, not the author of this book.

Mr. Turtur: I beg your pardon. They say there——

The Court: I noticed that there this morning myself.

Mr. Turtur: But they say there, your Honor, that in their opinion——

The Court: You will have to produce the other book, Jarvis, whoever he is—No, I haven't the right name—Norris and Landis; now have you got their book?

[fol. 783] Mr. Turtur: I don't know. I have another book here.

The Court: I noticed that sentence myself.

Mr. Turtur: That is their opinion.

The Court: It is a quotation, quotation marks. They are of the opinion—now let's have their opinion.

Mr. Turtur: Well, I am asking this doctor's opinion, because he says——

The Court: In other words, we can't have Norris and Landis quoted from unless we know who they are and what they have written.

Mr. Turtur: These people, your Honor please, Dr. Graham, did you say, or Landis?

The Court: Norris and Landis.

Mr. Turtur: Oh, I don't know who they are.

The Court: University of Pennsylvania.

Q. Do you know who Norris and Landis are?

A. Yes.

Q. Who are they.

A. Landis and Norris both are Phipps Institute of the University of Pennsylvania, reputable gentlemen, and even if they said it, I wouldn't take their word for it, because I have to give an opinion from my own observation.

[fol. 784] Q. You wouldn't take their word?

A. No.

Q. They are outstanding gentlemen in that field?

A. Yes, sir, they are.

Q. That's all, Doctor.

A. Thank you.

A Juror: Your Honor, may I ask one question? The Doctor made a statement that in the presence of this dust, that the individual would throw it off. I want to ask the question when a workman is subjected to this dust during practically all of the day, eight hours a day, for a long period of time, probably over years, and this explosion of dust occurs very many times, is it possible for him to always throw off that dust? Wouldn't any part of that enter into his lungs or stomach?

The Witness: It might.

The Juror: I mean this——

The Witness: I don't know that he could throw it off, or how he could throw it off, but the logical thing is that if the substance would be irritating, no matter when this irritating substance would be inhaled, that you would throw it off involuntarily, sir, you would have no choice about it.

[fol. 785] Mr. Rudner: How do you mean throw it off?

The Witness: Vomit, if it was irritating.

A Juror: But the question is, here is a workman, working eight hours every day over a period of years with this dust, an explosion. Of course we experienced how pungent it is, how heated it is, ourselves; he is working in this all day long. He surely cannot throw it off every day he is in it. There must be some part go into his lungs.

The Witness: Then it cannot be injurious or corrosive, or else he could not be subjected to it all day long, eight hours, for an indefinite period, sir, because it would demonstrate itself by a reaction on the part of the system, which would manifest itself by some symptoms, if not today, tomorrow or the next day.

The Juror: Wouldn't it be possible from this same caustic, that the injurious effect would become evident a number of years afterward in the same way you illustrate the silicosis and other occupational diseases not becoming evident for a long while?

The Witness: It might, sir, but if it was injurious from the beginning, of such a nature that you would designate it as either caustic or corrosive, then he wouldn't go on [fol. 786] for years to develop this as he does with silica, which he doesn't experience any difficulty from until the tissue in the body has changed from elastic tissue to hard, fibrous tissue; because he has no unfor-seen manifestations.

By Mr. Rudner:

Q. Silica dust, that is not soluble, is it?

A. No.

Q. That is not corrosive?

A. No.

Q. What is silica dust?

A. Well, it is silica dust. It is dust from SIO_4, we call it, chemically.

The Court: Isn't the reason for anthracosis and silicosis, Doctor, the heavy weight of the dust?

The Witness: Well, part of it, of course; it implants itself upon the tissues.

Q. And it is not corrosive in the first instance?

A. What?

Q. Silica dust?

A. No, never is corrosive.

Q. Pardon me?

A. It is never corrosive.

[fol. 787] Q. That is the distinction you make between silica dust, resulting in silicosis over a period of years, and this caustic soda which responds promptly?

A. That is not the distinction I make. I make the distinction, the distinction as referred to me by counsel, who says it is corrosive and caustic. I am talking about silicosis and anthracosis which is not corrosive.

Q. That is the distinction you make between anthracosis and silicosis with respect to dust, and this particular inorganic dust, of which we have been talking, is that right?

A. Yes.

Q. That's all, Doctor. Thank you.

The Court: Any other doctors, Mr. Rudner, please?

Mr. Rudner: Please come back to the stand, Dr. Pollak.

By Mr. Rudner:

Q. If we assume, Doctor, a caustic dust, regardless of the degree of causticity, does the individual upon inhaling it, if he does inhale it, respond immediately, or does he respond over a period of years?

A. It depends. If I were to inhale dust, as I have inhaled it at Colgate's soap plant, for instance, I can inhale dust made from the perfume, which will give me an irritating effect and I can stand that for a longer time, but [fol. 788] if I inhale dust, as I have done, from some of the soaps that they make there, they have an entirely different effect, and they manifest themselves by a feeling that you want to vomit, it irritates you. Now that is a caustic.

Q. I mean a caustic.

A. That is a caustic.

Q. I mean assuming a caustic dust. What I want is the physical response to the inhalation of a caustic dust.

A. Well, I have already said that caustic dust manifests itself as an irritant immediately if it is caustic, sir.

Q. That is what I have in mind.

A. If it is caustic. If it is not caustic then you may inhale dust for a long time.

Q. That's right, but if we assume a caustic dust, the response is very prompt?

A. Prompt.

Q. All right, Doctor.

By Mr. Turtur:

Q. Sodium carbonate, Doctor, do you know is used in the manufacture of soap?

A. I don't know that it is used in the manufacture of soap. Sodium salts are used, but I don't know whether carbonate is used.

A Juror: Reciting from your own experience at the Col- [fol. 789] gate factory, you were affected by the chemicals, were you not; you were affected by the caustic chemicals that were made from soap?

The Witness: I was affected by the powder which was powdered soap.

A Juror: Can you please tell me how men can stand that day in and year after year without any reaction?

The Witness: I don't know, except that in the up-to-date American factories of the industry, the Commission of New Jersey, Labor Commission, demands and requires that these people wear these masks, which they do, and they get very little of that substance down.

The Court: You mean they wear a mask at the Colgate plant?

The Witness: Yes, sir.

A Juror: Doctor, could you stand one more question?

The Witness: Certainly.

The Juror: This is some very free advice, your Honor.

The Witness: I will be the best advised person in the world.

The Juror: When we consider this bronchiectasis which we are all stumbling over, I believe you said, and what I [fol. 790] have heard here is, that it seems to be some sort of a chronic condition which cannot be recognized until, say, something else happens, and then the manifestation is pus and inflammation, and so forth.

The Witness: No, that is——

The Juror: Did I get that right?

The Witness: That is not exactly right. What they mean to say is that it cannot be diagnosed by the usual methods, but we have a method which we have developed on in institution and brought out, by injecting a catheter into the lung, a substance which we call litidol, a substance which is transparent, and when we X-Ray the individual, then regardless of how far this condition may be advanced, we can definitely say that this person has not a tuberculosis, but he has a bronchiectasis of a mild type.

The Juror: I see. Well, then, if we will say that at one point in the progress of this disease, say, the sounding or the usual lung tests indicate no obstructions, or any condition like that, would you say that that bronchiectasis might be present anyway?

The Witness: It might be present.

The Juror: And you couldn't detect that?

[fol. 791] The Witness: You couldn't detect that by the ordinary physical signs, no, sir,

The Juror: And then the appearance of a definite sign, would that be rather sudden, or would that sort of gradually come on?

The Witness: It comes on gradually. What the person usually notices is increased expectoration, offensive muco-prurulent expectoration, and perhaps his wife or father or mother notices the odor that comes from the individual. That is the usual way that bronchiectasis is diagnosed.

The Juror: All right. Thank you, Doctor.

The Court: Any other doctor?

Mr. Rudner: Not this afternoon.

Mr. Turtur: Just a minute. I have one question, your Honor please, if you don't mind.

The Court: I am not in a hurry.

By Mr. Turtur:

Q. Doctor, do you know whether or not this soda ash is used in the manufacture of soap?

A. I don't know, but I imagine it would be. I am not definite.

Q. Do you know, sir, by what industries it is used?

A. I don't know, sir.

Q. What would be the purpose, Doctor, of furnishing masks for these irritating chemicals?

[fol. 792] The Court: Do we have to have an answer to that question?

Mr. Turtur: All right, he spoke about the soap industry.

The Court: To keep it out of the nose and mouth, that is the answer, isn't it, Doctor?

The Witness: Of course.

Mr. Rudner: That's all.

Colloquy.

The Court: How many other doctors have you?

Mr. Rudner: I think three doctors, and a fourth man is the chemist. He is going to give the dust count.

The Court: What are the other doctors, experts?

Mr. Rudner: Experienced——

The Court: Experts?

Mr. Rudner: Oh, yes.

Mr. Turtur: Who are they, your Honor? I might be able to stipulate that if they were here they would say so and so. I mean we don't have to go on indefinitely. Who are they, please, if I may ask? I may stipulate that if they were here they would say certain things if you would tell me what they were going to say.

[fol. 793] Mr. Rudner: Well, we are going to have Dr. Smythe coming in from Cape Cod. You won't stipulate. He is going to give testimony with respect to the dust count based upon the testimony of his son with respect to dust count.

The Court: His son?

Mr. Rudner: His son made the actual tests.

Mr. Turtur: And the father is going to give it?

Mr. Rudner: Father and son worked together in this particular phase of the work. His son is not a physician, he is a chemist.

The Court: Are they both coming, you mean?

Mr. Rudner: Yes, tomorrow morning. They won't be very long.

The Court: All right. Who else?

Mr. Rudner: We have one more lung man.

The Court: The same as Dr. Pollak?

Mr. Rudner: Yes, but he didn't make the examination, and one other man in connection with the plant physician, if I can locate him.

The Court: I suggest to you, Mr. Turtur, that you had better produce Doctors Norris and Landis, if you rely on them. It now appears they are in Philadelphia.

[fol. 794] Mr. Turtur: I don't know how I can bring those gentlemen here.

The Court: Not very far away, are they?

Mr. Turtur: Well, I know, but I cannot afford to pay them.

The Court: Maybe they would be interested. What is their address?

Mr. Turtur: Philadelphia, University of Pennsylvania Phipps Institute, 34th and Spruce Street, Philadelphia.

The Court: You have their address?

Mr. Turtur: Yes.

The Court: Because the statement you read is of very little value, it seems to me, because it is such a general use of the word inorganic dust.

Mr. Turtur: Well, this is inorganic dust. What is the use of bringing them here? Dr. Pollak wouldn't agree with them anyway. Just as he says, it is he who counts, not the other fellow.

Mr. Rudner: That is highly objectionable, your Honor, and not fair.

The Court: Strike it out. We will finish tomorrow.

Mr. Rudner: I don't see how we are going to do it with all my lay witnesses.

The Court: What lay witnesses have you?

[fol. 795] Mr. Rudner: I have the foremen of the various departments this man worked in. All that I am asking is that we be afforded the same opportunity of presenting our case with respect to the facts that plaintiff was given. I mean I am not trying to waste time, but there are important issues of fact involved in this case. I want to give the court and jury the benefit of all these witnesses.

The Court: All right; ten thirty.

(At this point an adjournment was taken to Thursday, June 18, 1936, at 10:30 A. M.)

[fol. 795a] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 795-b] [Title omitted]

[fol. 796] Thursday, June 18, 1936.

Case continued.

Appearances as before.

M. James Fine, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Doctor, you are a licensed practitioner of the State of New Jersey?

A. I am.

Q. And what year were you admitted to practice in this state?

A. 1912.

Q. Of what medical college are you a graduate?

A. I have attended the University of Vermont and graduated from the University of Maryland in 1910.

Q. Do you specialize in any branch of medicine?

A. I am a specialist in diseases of the chest.

A. All right. Now, tell me your experience and qualifications subsequent to your graduation from medical college

A. I am doing lung work since 1910. After I graduated I became assistant superintendent in the workmen's Circle Sanitarium at Liberty, New York, where I spent six months.

[fol. 797] Mr. Turtur: I will admit his qualifications to save time.

Q. You are director of some tuberculosis——

A. I am director of the Department of Tuberculosis.

Q. Of what?

A. In the Newark Board of Health; consultant in tuberculosis to New Jersey State Health Department, visiting phthisist to Newark Beth Israel Hospital, Newark City Hospital, Brown's Mills Sanitarium; examining physician to National Tuberculosis Hospital at Denver, Colorado;

director and examining physician of the Essex County Trades Union Anti-Tuberculosis.

Q. Doctor, you have seen these X-rays which are in evidence as Exhibit P-3. I will ask you to take them in the order which I have them, which are chronological, and tell us of your findings.

A. Have you a brown sheet of paper or that green envelope? There is an area of consolidation or infiltration at the right base on the right side.

The Court: Now, do we have to go into this again and again and again, Mr. Rudner? I have had everything of this brought out at the greatest length. There is no difference of opinion about it.

[fol. 798] Mr. Rudner: All right, eliminate that—well, yes, there is one thing I want the Doctor to testify to because I think it is material in connection with this case. I am not trying to waste time, your Honor.

The Court: What is that?

Mr. Rudner: That is as to whether he finds anything with respect to—I am going to make a statement—fibrosis or any condition——

The Court: Nobody claims there is any fibrosis.

Mr. Rudner: Well, that is material to our case in connection with the inhalation.

The Court: I understand it is material to your case but nobody claims there is any fibrosis.

Mr. Rudner: Which sustains the theory——

The Court: All right, it is conceded. Therefore it doesn't have to be proved.

The Witness: Do you want me to make the diagnosis?

The Court: No, there is no fibrosis in the lungs, no one claims it.

Mr. Rudner: Your Honor, this is material to this doctor's diagnosis of the situation.

The Court: Who is this doctor?

Mr. Rudner: This doctor?

[fol. 799] The Court: Yes.

Mr. Rudner: Why, he has stated his qualifications, he is a lung expert.

The Court: He now says he wants to state his opinion. That is a novel theory for experts. I thought witnesses didn't care whether they testified or not.

Mr. Rudner: Well, if your Honor please, all I am asking, sir, is to have the same privilege or presenting my case that the plaintiff was afforded, that's all I am asking.

The Court: I restricted the plaintiff when he tried to repeat his testimony. I try to restrict everybody who tries to needlessly burden my time and the jury's time and the record with useless testimony. That has always been my practice, and I think it is a sound one.

Mr. Rudner: If it is useless I agree with your Honor.

The Court: It is useless to ask a witness to testify to something that your opponent concedes.

Mr. Rudner: I will bring it out another way then.

Q. Doctor, you have examined those X-rays?

A. I did.

[fol. 800] Q. In so far as there are any conditions evident from the X-rays on which side are they evident?

A. On the right side.

Q. What evidence do you find of anything on the left side?

A. None whatsoever.

Q. Have you had experience in connection with dust cases and particularly with regard to the inhalation of dusts?

A. I did.

Q. Now, Doctor, in the ordinary process of inhaling dust, inorganic——

The Court: Where have you had such experience?

The Witness: I am director of the Department of Tuberculosis and see hundreds of cases in the Health Department. I have been at this since 1916.

The Court: I understand that but where have you had experience with dust cases coming into the hospital?

The Witness: I have had experience with dust cases in the Health Department and in my private practice.

The Court: All right.

[fol. 801] (Question repeated by the reporter.)

Q. (Continuing.) —or any other kind of dust, what is the physical process and effect of inhaling?

Mr. Turtur: I object to the question, your Honor please, because it takes into consideration "or any other kind of dust." We are dealing here with inorganic dusts only.

The Court: Restrict it.

Q. Can you answer the question?

The Court: No, did you hear that, Mr. Rudner?
The Reporter: "Restrict it."
Mr. Rudner: Yes, I heard your Honor.

Q. What are the physical processes of inhalation, how does one inhale dust?

Mr. Turtur: I object to it, your Honor please.
The Court: Really, Mr. Turtur, how could there be any difference in the process of inhaling one kind of dust or another kind of dust?
Mr. Turtur: Organic dust is one thing.
The Court: Do you think there is a difference?
Mr. Turtur: Oh, absolutely.
The Court: In inhaling it?
[fol. 802] Mr. Turtur: Oh, not in inhaling it, the results.
The Court: Then please don't object without understanding the question. You may answer.
Mr. Turtur: Your H[illegible] restrict it to inorganic dust.
The Court: Not the process of inhaling it, the effect.

A. The inhaling of dust, if it is a dust that causes corrosion, it usually inflames the entire mucous membrane from the mouth down to the bronchi. The most severe irritation would occur in the upper respiratory tract. The bronchioles and the air vesicles would be least affected and very little, unless there is a massive introduction of irritating substances that would affect the patient,—it would knock him out; a certain amount of irritating substance would get in in the air vesicles and also in the bronchioles.

Q. Now, when an individual, when the average man inhales say a dust of an irritating nature, inorganic in nature, over a period of time, what is the effect ultimately in the process of inhalation upon the respiratory organs and the organs leading to the lungs?

Mr. Turtur: I object to the question, your Honor, please, on the ground it does not state the full facts that George [fol. 803] Matey was subjected to, and we are dealing here with an average man and it doesn't state the conditions.
The Court: You may answer.

A. It depends on the ability of the man or the virulence of the gases or the inhaled substance. Some may inhale a great deal of gases of irritating substance without any effect whatsoever; others may be affected with very little irritating substance and react very badly.

Q. Suppose they inhale over a period of time and they react, as you say, badly, is that evidenced and observable from X-ray or otherwise?

A. If the irritating substance does damage, first inflammation occurs, then fibrosis occurs and it must show in the X-ray. It is impossible to have any fibrosis or any damage done to the lung as far as irritation of substances outside of what belongs in the lung without showing in the X-ray and it usually is shown symmetrically on both sides. The inhaled substance usually gets in into the base of the lung. You find it on the right side as much as on the left because the bronchi are divided above in two portions and they go down to each base on the right side and the left in the same number of bronchioles and bronchi.

[fol. 804] You mean upon the inhalation of dust it is equally divided in going from the mouth and nostrils into the lungs?

A. Right.

Q. Is there any possibility of dust being inhaled and going into one side only?

Mr. Turtur: I object to the possibility, your Honor, please.

Mr. Rudner: Probability.

A. There is——

Mr. Turtur: Just a minute.

The Court: Probability.

A. There is a probability and a possibility when——

Mr. Turtur: I object to the possibility.

Q. Probability.

A. —probability, when there is an obstruction in one side there must be pathology in that side. If the air does not go in on the other side, the inhaled substance will go in on the other side, there must be an obstruction to that side, but when the lungs are normal there is an equal distribution of gases on both sides, or irritating substances on both sides.

Q. In the process of inhalation of dusts, irritating dusts of inorganic nature, would it be possible to have a condition resulting from such inhalation?

Mr. Turtur: I object to the possibility.

[fol. 805] Q. —without evidence thereof being in the X-rays?

Mr. Turtur: I object to the possibility.

The Court: Please do say probability, Mr. Rudner.

Q. Probability.

A. No.

Q. Why not?

A. If the substance does damage there must be a connective tissue formation infiltration first, and when the connective tissue forms the elasticity of the lung is lost and it has to be seen in the X-ray.

Q. What is fibrosis?

A. Fibrosis is usually, when you see it on the body, a white flesh as you see it, or hardened non-active material. It is fibrous tissue thrown out and is drawn and extended into the parenchyma of the lung.

Q. In the X-rays that you examined did you find any evidence of fibrosis at all?

A. Not at all.

Q. What does that indicate to you with respect to the probable inhalation over a period of time of any irritating dust of inorganic nature?

Mr. Turtur: Your Honor has already ruled on that, [fol. 806] your Honor please; if we want to waste time, that is a different situation.

Mr. Rudner: Your Honor please, it seems to me when counsel was examining he wanted a wide latitude and he objected to my interruption.

The Court: I will allow the question.

Mr. Rudner: All I am asking is the same opportunity plaintiff had, not a bit more.

Mr. Turtur: You are not withholding anything, Mr. Rudner; I don't think the court is allowing you to withhold any.

(Question repeated by the reporter.)

A. In this particular case?

Q. Yes.

A. No damage is done to the lung.

Q. Have you had in your experience cases of bronchiectasis?

A. Hundreds of cases.

Q. Have you had in your experience cases of an abscess of the lung?

A. Hundreds of cases.

Q. You never examined Mr. Matey, of course?

A. No, I did not.

Q. Can you tell from the X-ray without more as to whether it is an abscess or a bronchiectasis?

A. I cannot.

[fol. 807] The Court: Doctor, is it possible to get bronchiectasis from inhalation of dust, in your judgment?

The Witness: No, never, it hasn't been of record.

The Court: Well, yesterday there was a statement—where is that book again? Did you get that book or whatever it was, of those doctors.

Mr. Turtur: I have tried to get the book, sir, and it is not carried in this library.

The Court: It seems to me you might have tried a little earlier.

Mr. Turtur: Landis and Norris' book?

The Court: Yes.

The Witness: Why, you can get it in the library of the Academy of Medicine or in the Beth Israel Hospital library.

The Court: Here in Newark?

The Witness: Here in Newark.

Mr. Turtur: I tried to get it in Elizabeth, I couldn't get it.

The Court: How can we get it, Doctor?

The Witness: If you want me to I will bring it to you.

[fol. 808] Mr. Turtur: Here is your section here.

The Court: Could you get it today for us?

The Witness: Yes, I will.

The Court: You are familiar with it, are you, Doctor?

Mr. Turtur: I will be happy to send Mr. Blachman right up for it if the Doctor——

The Court: Can you give him a note?

The Witness: Yes.

The Court: Will you give him a note for it, please.

The Witness: Call up the Beth Israel Hospital.

Mr. Turtur: It might be well as a matter of suggestion to ask the Doctor whether he recognizes Norris and Landis.

The Witness: I do.

Mr. Turtur: And all these others?

Mr. Rudner: I am not interested in that.

Mr. Turtur: I am not speaking to you, Mr. Rudner, I am addressing my remarks to the court.

Mr. Rudner: I suggest your suggestions is out of order.

Mr. Turtur: That is your theory.

The Court: You see, they say, Doctor, in this quotation— [fol. 809] we won't go any further with it now, until we get the book—they say, "On the other hand, they—that is Norris and Landis—are of the opinion that one of the most frequent causes of bronchiectasis is the prolonged exposure to inorganic dust." That is what they say. When we get the book we will see whether that is qualified.

Mr. Rudner: Your Honor, I don't like to make an objection but it seems to me the statement is being made with respect to the opinion of another doctor without the doctor being here and giving his basis and experience and whatnot. It is just an abstract question which goes in evidence as a statement of fact and I submit, sir, it is prejudicial.

The Court: We will see if we can get the book. Don't answer that.

Mr. Rudner: Pardon me?

The Court: Read Mr. Rudner what I said.

Mr. Rudner: I heard it.

The Court: I told him not to answer it.

Mr. Rudner: I understand, but I say the point is, sir, the statement is presented——

The Court: Not as evidence.

[fol. 810] Mr. Rudner: May I have an exception?

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Now, Doctor, do you say that from the inhalation of dust, inorganic dusts, it is impossible to acquire bronchiectasis?

A. Bronchiectasis? Now you must realize there are types of bronchiectasis—if you call a bronchiectatic cavity, a simple dialatation, without any symptoms, that may occur in almost any lung condition, but when we are talking about bronchiectasis we are talking of a massive bronchiectasis.

The Court: A what?

The Witness: A massive, a large. I don't know whether you have a bronchiectasis in this case. You can have an abscess and you might have a gangrene of the lung—in this case you have a smelling odor from the man's breath. The reason I speak about it is because I have heard the testimony yesterday right here in court of Dr. Pollak.

Mr. Turtur: Well, then, I submit, your Honor please, that all of the testimony that this doctor says as to bron- [fol. 811] chiectasis be stricken because he is relying on what Dr. Pollak said and he just definitely admits that he doesn't know in this case whether we have a bronchiectasis or a lung abscess or gangrene. I submit therefore——

Mr. Rudner: The only honest thing this man can say. He has never seen this man.

Mr. Turtur: The only thing I beg of you, Mr. Rudner, is that you allow me to address the court.

Mr. Rudner: I respectfully ask you to be fair.

Mr. Turtur: I am more than fair.

Mr. Rudner: I haven't seen it.

Mr. Turtur: May I finish my statement, your Honor? He has now admitted that he does not know whether this is an abscessed lung or bronchiectasis or a gangrene. How can he submit an opinion if he doesn't know what this man is suffering from?

The Witness: Now, your Honor, I don't think——

Mr. Turtur: Just a minute, Dr. Fine, don't be so anxious.

[fol. 812] The Court: Motion denied.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. I think——

Q. Eliminate, Doctor, anything you hear from any witness whatsoever.

A. From the X-rays examination, from this plate, nobody can tell—there is pathology in this lung—nobody can tell whether there is a bronchiectasis or gangrene or abscess of the lung unless a test is done, a lipoidal injection, to show that there is a dilated bronchi showing the bronchiectasis, or if it is a circumsized abscess, but from the X-ray finding you know that there is pathology; there is damage to the lung; there is an abnormal condition there, but what exactly the condition is from X-ray nobody can tell, neither can I.

Q. Now, you are not undertaking to say whether it is bronchiectasis, abscess or gangrenous condition?

A. No.

Q. Now I ask you, Doctor, having regard to your experience, having regard to your studies of chest diseases, is it possible or probable that a bronchiectasis could result from [fol. 813] the inhalation of any dusts of an inorganic nature, of an irritating nature?

Mr. Turtur: I object to the question, your Honor please, unless the Doctor is given all the facts that this gentleman was subjected to. We are not going to go into cases——

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. No.

Q. Suppose I submit the same question to you directed to an abscess, pulmonary abscess; what is your answer?

A. Inhalation of inorganic substances do not cause any bronchiectasis nor abscess nor gangrene of the lung.

The Court: Why is that so, Doctor? Tell us why you think that is so about the bronchiectasis.

The Witness: I have to again speak about the massing, I have to correct my answer if you want it more elaborate.

The Court: Yes, we do.

The Witness: If there is a massive inhalation of gases [fol. 814] there is an inflammation, a bulk inflammation there. You may inhale some of the germs that are in the respiratory tract, an infection takes place and anything may occur there; you may develop pneumonia, you may develop a bronchiectasis, you may develop gangrene and you may develop an abscess, but from the gradual irritation causing a fibrosis there is no infection, in fact fibrosis is a preventive of infection. You cannot infect a scar tissue because there are no blood vessels, it doesn't carry anywhere. On that basis, you cannot develop bronchiectasis, abscess or gangrene but when there is an acute inflammation, anything may occur in the chest. I have my opinion about the cause of this case.

Q. We will get to that later on. Doctor, you spoke of a massive inhalation which might bring about the results which you mentioned; is that spontaneous?

A. Spontaneous, an explosion, I have testified in those cases.

Q. How quickly would that act to bring about these results after the exposure to this massive condition?

A. There is a massive inflammation, a burning, the [fol. 815] destruction of part of the lung or the bronchi and infection sets in. That is simply——

Q. How quickly would it act?

A. It comes on within twenty minutes like a burn.

Q. But from the gradual inhalation?

A. There is no possibility.

Q. No possibility.

The Court: What is the cause, what is the reason, Doctor, that bronchiectasis cases follow contact of the lung tissue with a foreign body?

The Witness: No, it isn't the contact.

The Court: I mean you explain it to us. You see we are ignorant.

The Witness: A foreign body acts as an obstruction to the bronchi and it must be a large mass, a large substance, like a tooth or a nail and not those particles that are inhaled and absorbed through the air vesicles like silicate dust. I wish you would let me draw this on the board.

The Court: Yes, certainly, Doctor.

The Witness: If you please.

A. This roughly—I am not an artist—here are the air vesicles right here; here is the lung; this is the left lung and this is the right lung; this is the mouth, and where the bronchi divides, right here into the right and left bronchi [fol. 816] and then the bronchioles, the air vesicle. It happened on this side. Those are the air vesicles and here is a little bronchi which is much smaller than that.

Mr. Turtur: Pardon me, Doctor. Is that the right you are referring to?

The Witness: I am referring to the right.

A. (Continuing) A foreign body enters right here. That is the size of the foreign body.

The Court: Can you all see this, gentlemen? Step out of the jury box if you want to.

A. (Continuing) The foreign body is right here. It obstructs all these air vesicles and the little bronchi. The result is that the air retained in those bronchi is trying to get out but there is an obstruction here. This becomes swollen and the bronchi becomes much larger and the infection sets in and it inflames that wall of the bronchi. That causes a bronchiectasis. The mucous is right here, all right in here. When you remove that foreign body that is released, it opens; if the purulent material or the broken down material is thin enough, the patient will expectorate through the mouth and that may heal, but if this is becoming more infectious and that is spreading, an abcess may [fol. 817] form, circumscribed, and if there is no communication with the bronchi, that will still spread and instead of staying right here will break through and smell and the rotten stuff will come right through the bronchi and you will have that smelling odor all the time, and if they cannot open it will break through here and you will have to make an opening right here to take it out—that is a foreign body —but those little things, why, they go through the vessel, it cannot happen.

The Court: In other words, you say that stopping of the air is what does it?

The Witness: Stopping of the air and cutting off the blood supply and everything else there causing a certain amount of obstruction. If you obstruct right here and you obstruct everything there, you get final gangrene if you don't release it.

The Court: I understand.

Q. Are particles of dust within the category of foreign substances?

A. No, they are foreign to the lung, yes, but I mean we don't understand when we talk about a foreign substance we are talking of a massive substance; we have particle of dust all the time in the street, coal miners have a great [fol. 818] deal of dust in their lung without any trouble whatsoever. You find a miner works 32 years in the mine and then you take an X-ray picture, it is filled with dust and the man is absolutely workable.

Q. If an inorganic dust substance irritating in nature is inhaled, and as you say brings about this fibrotic condition or fibrosis, must it as a preliminary not have affected the eyes, the mucous membrane of the mouth and nose?

Mr. Turtur: I object to the question as being exceedingly leading. I think the Doctor ought to state what it would do.

Mr. Rudner: To a physician, sir, it cannot be leading, to a layman it might.

A. The most sensitive part of the human anatomy is the conjective of the eye. You know when a little hair or anything gets into your eye you cannot stand it, it has to be removed. Now, if the irritating substance is so corrosive and irritating, I believe that the eyes would be affected first.

Q. What else would be affected?

A. The mucous membrane of the mouth, nose and the entire mucous membrane tract, down below to the bronchi and bronchioles and air vesicles.

The Court: Would constant coughing bring about a [fol. 819] bronchiectasis?

The Witness: Yes.

The Court: Constant coughing would?

The Witness: Yes.

The Court: How would that operate?

The Witness: If there is obstruction there. For instance, a particle of mucous lodges in the bronchi, that acts like a foreign substance, the patient is trying to cough it up. That is the reason you have it in whooping cough. Some patients—when the patient coughs he dilatates the bronchi, but that dilatation accomplished without infection has no effect whatsoever on the individual.

The Court: I don't quite understand that, Doctor. How does the coughing operate?

The Witness: The cough—you are trying to force everything out, you are using all the muscles, everything in the chest to bring that substance out. If your force behind is great enough you will just cough it out; if it isn't, if your lining of the lungs are less resistant, than the foreign body, it will stay there and cause the bronchiectasis.

The Court: Then it is not the coughing that causes the [fol. 820] bronchiectasis?

The Witness: No.

The Court: No, the cough is a part of it. If the man wouldn't cough and he would even have a weak lung, if he wouldn't cough and he would have a weak lung, he wouldn't have any bronchiectasis. He must have a strenuous effect and then have a weak spot to bring this out, one depends upon the other.

Q. Does an inflammatory condition precede fibrosis or does it follow fibrosis?

A. That precedes fibrosis.

Q. And this, in connection with an inhalation of inorganic dusts of an irritating nature, is generally both sides?

A. Yes.

Q. Doctor, I want you to take into consideration the facts I am going to state to you now and let me have your opinion as to probable cause of Mr. Matey's present condition.

In December, 1928, he entered the employ of the Grasselli Chemical Company plant as a furnace man, assistant furnace man, first for a couple of weeks, and then furnace man in the silicate department where he worked in a room where silicate glass was made out of a combination of sili- [fol. 821] cate, sand and soda ash which were mixed in a mix room, coming through hoppers into a furnace, there molten and coming out. He worked in that furnace room, which I might say adjoined a room where metasilicate was manufactured, which is also a powdered substance similar to soda ash, the metasilicate room, where it was walled off and had doors which were sometimes open and sometimes closed. He worked in that silicate department until some time in the fall of 1932 and while he worked in that room he at one time did develop a carbuncle on the back of his neck for which he underwent an operation; subsequently he developed an irritation in the groin, rectal region, under the armpits, which were subjected by Dr. Oleynick to tests of the particular powders in which the man worked and proved to be negative. In the spring of 1933 and some few months thereafter he was subjected to some fungus tests which proved to be positive. He then was transferred to the phosphate department where he himself did not handle soda ash or phosphate of soda but somewhere in the department there was soda ash being handled and phosphate of soda, and he did come in contact with some soda ash and phosphate of soda. Assume that. He worked in that department until some time in November of 1933. On Octo- [fol. 822] ber 23, 1933, he was given a complete physical examination running from forty minutes to an hour, which included an examination from head to foot, including his chest. In so far as the chest is concerned, no rales were present and the doctor found no conditions with respect to the chest. At that time he had a chest expansion of three inches. On June 14, 1933, he went to the Alexian Brothers Hospital in Elizabeth to undergo an operation for right hernia. Prior to the operation he was examined by the chief house surgeon and he found no rales, found no chest condition of any kind; in other words, the examination with respect to chest was entirely negative. He was then operated upon for a hernia and no evidences of any chest condition. While he was at the hospital for a period of seventeen days. At the expiration of the seventeen days he went home, and three days thereafter, while sitting outdoors, he felt a general lung breakdown, I think, as he said, with heavy expectoration and coughing up; and assume that while he was working in the silicate department there was soda ash dust there and assume that while he was working in the phosphate department there was soda ash dust and phosphate of soda dust, and further assume, for the purpose of [fol. 823] this question, that Mr. Matey has a lung abscess; please tell us as to the probable cause of the abscess from the inhalation of these dusts which I have mentioned which are inorganic in nature, and for the purpose of this question assume that they are irritating in nature.

Mr. Turtur: I object to the question, your Honor.

The Court: I thought you contended he didn't have a lung abscess, Mr. Rudner.

Q. Assume one other thing—excuse me—assume that during the operation for hernia he was given a general anesthesia of ether.

Mr. Turtur: I object to the question, your Honor please.

The Court: I though that you contended he did not have a lung abscess.

Mr. Rudner: Well, I am saying now that he did; then I am going to assume the bronch-ectasis. I said for the purpose of this question, let's assume the plaintiff's diagnosis of a lung abscess.

The Court: I understood he withdrew it.

Mr. Rudner: I don't think it is withdrawn.

Mr. Turtur: I didn't withdraw it, your Honor please. My doctors say that the man has a lung abscess, they say [fol. 824] it is a bronchiectasis and the pictures say it is about the same.

The Witness: That's right.

Mr. Turtur: Now, my objection to the question is all the facts have not been given to the Doctor; he didn't tell the Doctor about the cough since the end of 1931, he didn't tell the Doctor about the dermatitis, he didn't tell the Doctor about how many times he was subjected to the treatment for his skin, rash, he didn't tell the Doctor all these other things.

Mr. Rudner: Your Honor please, on cross-examination counsel can put any question he wants.

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. From the history given to me at the present time and from the observation of the X-rays, I am of the opinion that whether he had irritating substances inhaled or not, there was no damage done to his lung, and this is not the result of any inhalation of irritant substances.

Q. Assume, Doctor, the same question containing all the [fol. 825] facts which I just gave you in the previous question, with this difference that instead of the lung abscess assume a condition of bronchiectasis. Answer that question now with that change.

A. There would be no change at all.

Q. Assume the same state of facts in my hypothetical question with this single change that instead of an abscess or bronchiectasis assume a gangrenous condition; what is your answer?

Mr. Turtur: All subject to my objection, your Honor please.

A. The same answer.

Q. And why do you say that? Give us, Doctor, an explanation as to why you have come to that opinion.

A. Now, this man came to the operating room and has been examined, and I don't conceive that any doctor would dare to give an ether anesthesia unless he found that the patient's lung was absolutely normal. He gave him an anesthetic of ether. He did not have any bad effect from the ether at all. If the ether anesthesia would have done any harm, he would have had it immediately within twenty-four hours. He recovered from his operation, he went home, he walked around; three days later he shot an embolus in his lung.

The Court: What is that, Doctor?
[fol. 826] The Witness: Embolus is a substance that comes from the seat or can come from anywheres into the circulatory system, some foreign substance, it may be infected material, it may be fat, it may be catgut from the operation; it may be tissue, anything, into the circulatory system carried by the venous system into the lung; then entering the lung obstructing that part where that bronchiectasis exists, obstructing that part and cutting the entire blood supply off, causing that either to become gangrenous or causing a pneumonia. Having this infected material right there, that resulted. The fact is that the man's chest had a three inch expansion which is absolutely of a normal chest. Irritating substances enter the lung—if you saw any person that had silicosis or pneu-onoconiosis or from any irritating substance, his chest becomes barrel-shaped, it becomes fixed; there is no expansion at all. This man had a normal expansion, his chest was absolutely negative because he was operated, the ether did not affect him, he was all of a sudden taken sick with a coughing spell and that, in my opinion, shows that he shot an embolus which caused an infaret of the lung—pardon me, [fol. 827] an infaret is this: here is the artery, the blood supply is cut off this way, it is fan-shaped, and the entire thing, if there is infected material, the entire thing becomes infected until a connecting link between this artery that is obstructed and new arteries form so that the circulation is established. You may have either a bronchiectasis, a gangrene or an abscess of the lung without any cause whatsoever, and you have hundreds of cases that are operated for abdominal operation which shoot an embolus either in the brain and they die. Incidentally, "The operation is successful and the patient dies" of an emb*lous*, or if it lodges into the lung, either it kills the patient or he gets a pneumonia or a bronchiectasis as a result of it. Or even you have heard of a milk leg. Another thing is shot and the patient develops a phlebitis, a milk leg, after an operation or after pregnancy. That is the same result as in this chest.

The Court: If he had been given ether and had a bronchiectasis at the time, what effect would that have had upon him?

The Witness: The patient would have had pneumonia and may not have survived at all after the operation.

[fol. 828] Q. Suppose this man had an abscess at the time of the operation?

A. Any patholotigal condition in the chest, even bronchiectasis.

Q. And the application of ether has what effect?

A. It has a destructive effect upon the chest, upon the parenchyma of the chest.

Q. How quickly does that operate after the application of ether?

A. Within 24 hours.

Q. What would be the result?

A. It would be practically the same. A man may entirely recover after the infection or may develop pneumonia, become terminal and die. Many things may happen after that.

Q. The fact that he had this general anesthesia in connection with the operation and the operation was successful and he stayed at the hospital seventeen days, indicates to you what, with respect to the pathological condition of this man's lungs prior to the operation and at the time of the operation?

A. At the time of the operation and before the operation the man's chest condition was all right.

Q. Is a chest expansion of three inches at all significant to you, having regard to the fact that the chest expansion just took place in October 23, 1933?

[fol. 829] Mr. Turtur: The Doctor has answered three times that it is an indication to him that it is normal.

A. There is one indication——

Mr. Turtur: Just a minute, Doctor, please, I object to the question.

The Court: You may answer.

A. (Continuing). Now, if you take the expansion of this man's chest at the present time you will find that he has no expansion on the right side at all. Now, if he has any bronchiectatic condition the expansion on the side that he has the bronchiectasis would have been much below normal.

Now, if a man has an expansion, a normal expansion of three inches, which is usually a good expansion, if he would have had a pathological condition there and it interferes with his breathing, his expansion would in general come down almost to half and probably more.

Q. The inhalation of silicate in connection with silicosis is, of course a different classification entirely?

A. There is a different effect entirely, inhalation of silica and corrosive substances are absolutely two different things.

Q. What is the difference?

[fol. 830] A. The silica dust does not cause the pathology from the irritation that the material has been inhaled; you must realize that to get silicosis the particle must be of the smallest particle of millionths of size of five microns or less. That is the reason, because it goes through the bronchioles and the air vesicles and they go into the lymphatic stream and then obstruct the lymphatic channels, then causing fibrosis and the inflammation, phagocytosis and inflammation and fibrosis there, an irritant caused directly on the mucous membrane of the bronchi and not caused by deposit or inhalation.

Q. Then in your opinion, based upon the facts as I have presented them to you in my hypothetical question, the present condition of this man, whether it be a bronchiectasis or an abscess, has no relation whatsoever to the working conditions in which he worked?

A. None at all.

Q. It might have happened to him had he been outside as a gardener?

A. If it had been a woman it might have happened to a housewife.

Cross-examination.

By Mr. Turtur:

Q. Doctor, you said you read the testimony in this case, [fol. 831] didn't you?

A. I heard part of the testimony yesterday.

Q. Didn't you say to Judge Clark that you read part of the testimony?

A. No, no, I heard it.

Q. Did you confer with any doctors in this case?

A. Yes, I spoke to Dr. Pollak about it or Dr. Pollak spoke to me about it.

Q. Yes. And, of course, you are taking what Dr. Pollak says as being the truth, isn't that so, and as being correct?

A. Now——

Q. Will you please answer my question, Doctor?

A. I cannot answer you.

Q. Why can't you answer me?

A. Because there are some contradictory—there are some statements that I don't even agree with Dr. Pollak.

Q. Oh, you don't agree in some instances with Dr. Pollak?

A. Yes, that's right.

Q. I see. Now, you testify quite often, don't you Dr. Fine?

A. I do.

Q. Yes, very used to court work?

[fol. 832] A. I am in court quite often for the plaintiff and otherwise.

Q. And otherwise. Now you are taking into consideration, Doctor, that ether was given this man.

A. I heard it was.

Q. You weren't told also, were you, that there was also nitrous oxide given to this gentleman. Suppose it was——

The Court: Counsel, that is the customary method of administering an anesthetic.

The Witness: To give ether, that's right.

Mr. Turtur: Your Honor please, I am informed by very competent sources that that is not the method of giving anesthesia.

The Witness: It is at the present time.

The Court: Are you now going to sue the hospital?

Mr. Turtur: No, no, no. I haven't that in mind at all, your Honor please. Giving ether has one effect upon the system and ether with nitrous oxide has another.

The Court: Well, do you contend that therefore a harmless effect——

Mr. Turtur: I content something else, your Honor please. On cross-examine it will develop.

[fol. 833] The Court: All right. * * * Doctor, they say at the Beth Israel Hospital they haven't that book.

The Witness: I will bring the book this afternoon even if I have to go to New York.

Q. Now, Doctor, isn't it a fact that when a lung condition is present that ether for a general anesthetic is contraindicated and nitrous oxide in conjunction with ether is used to obtain surgical relaxation?

A. Now you want my opinion?

Q. I am asking you to please answer my question.

A. I will. I will have to explain before I answer it. I personally would not give ether in any form to my pulmonary cases, disregarding how much——

Q. You would not, would you?

A. No, I would not.

The Court: With or without?

The Witness: With or without.

Q. And ether—will you please now answer the question that I asked you?

A. What is it please?

(The following question was repeated by the reporter: "Now, Doctor, isn't it a fact that when a lung condition is present that ether for a general anesthetic is contra- [fol. 834] indicated and nitrous oxide in conjunction with ether is used to obtain surgical relaxation?")

A. No.

Q. You don't agree with that?

A. I don't agree with that, no, emphatically no.

Q. How long after an operation for an inguinal hermia, in your opinion, would this embolus occur?

A. It usually doesn't occur until the patient walks about, it may be about two weeks after the operation or three weeks after the operation.

Q. Now, isn't it so, Doctor, that the emblous, if it does occur, always occurs never later than 48 to 72 hours?

A. Absolutely no, embolus does not occur——

Q. I don't want to put any boxing gloves on, Doctor, just answer my questions; we will get along fair.

Mr. Rudner: Just answer the question.

Q. You don't agree, Doctor, that embolus occurs within 24 to 72 hours thereafter if it is due to the ether?

A. To the ether? I said yes. But I am talking that the embolus in this case is not an ether embolus.

Q. It is not an ether embolus?

[fol. 835] A. No, and that is where I disagree with Dr. Pollak.

Q. Now, where does the embolus come from?

A. It comes from the seat of the operation.

Q. The seat of the operation and the seat of the operation in this case—did you know it was a hernia?

A. I do, emphatically, yes.

Q. And then from the hernia, in that region, it traveled all the way up into the lung region, in your theory, is that so?

A. This little blood that is around the operating seat travels all over the body, not only there but it also travels to the head.

Q. An embolus, Doctor, is a blood clot?

A. That's right.

Q. Which is carried from the seat of the operation?

A. That's right. In this case it carried the embolus maybe from—the man may have a cardiac condition.

Q. Oh, it didn't do that in this case?

A. It did it in this case, yes.

Q. What did it do and what didn't it do?

A. Will you let me answer?

Q. Will you please answer my questions?

A. I cannot answer you.

Q. What did it do and what didn't it do?

[fol. 836] A. The embolus was shot from the seat of the operation in this case.

Q. That was the hernia?

A. That was the hernia.

Q. The seat of the operation in this case was the hernia region?

A. It was an abdominal operation, that's right.

Q. And then from the abdominal operation it traveled up into the right lung region?

A. Yes, it did.

Q. And the embolus is a blood clot, isn't it?

A. A blood clot, yes—not a blood clot, any foreign substance in the blood may cause an embolus.

Q. What foreign substance would there be in this case to cause it?

A. There may be an infected material, fat, anything that is within the seat that enters the blood stream.

Q. The seat of the operation you are talking about?

A. The seat of the operation, I am talking about, yes, the seat of the operation.

Q. And you are assuming that there was fat in the seat of this operation?

A. There is always fat at the seat of an operation.

Q. And that fat then can bring about this embolus?

[fol. 837] A. I don't think that this particular one substance—there may have been fat, there may have been infected material, there may have been anything around that area that enters the blood stream.

Q. Then your theory of the embolus is only based upon what theory?

A. The theory is based upon my experience.

Q. What experience?

A. In post-operative infarct or emboli.

Q. Your experience, you said, in many years has been in the field of lungs, isn't that so?

A. That's right, but when the lung is affected I am called in.

Q. I see. And you are called in when the lung is affected, when the man gets an operation for hernia then you, Dr. Fine, come in?

A. Not when a man has an operation for hernia, when the man developes a pulmonary condition.

Q. Yes. And when the man develops a pulmonary condition that is usually due to a tonsillectomy operation, isn't it, Doctor?

A. No, it isn't, it may be due to that.

Q. It may be due 99 per cent of the cases, isn't that so?

A. No, no, you are talking about the seat of an operation.

[fol. 838] Q. Now, please——

Mr. Rudner: Will you let the Doctor answer, please? Will you please not try to mix me up, please.

Q. I am trying to mix you up?

A. Yes.

Mr. Rudner: I think if counsel will be a little calm in propounding his questions, I think the witness will be calm in giving his answers, no use getting excited about it.

Mr. Turtur: Thank you, Mr. Rudner.

Q. Your theory in this case, Dr. Fine—Fine, isn't it?

A. Yes, Fine, right.

The Court: Don't be insulting, Counsel I will warn you again.

Mr. Turtur: Your Honor please, I am not insulting, this is cross-examination.

The Court: That is an insulting thing to say to anybody, you must stop it.

Q. You were rather anxious to testify in this case weren't you?

The Court: That is insulting. Now you must stop insulting the witness.

Mr. Turtur: Well, your Honor please, this is cross-exam- [fol. 839] ination.

The Court: I will not have witnesses insulted, yours or the other side.

Q. Now, Doctor, aren't X-rays—I withdraw that, please.

Q. You made an examination of these X-rays when?

A. Just before, I saw them just now before the court was in session and right now.

Q. You saw the X-rays before the court was in session?

A. Right at this table, yes, sir, I did.

Mr. Rudner: Yes, sir.

Mr. Turtur: Do you want to take the stand, Mr. Rudner?

Mr. Rudner: Your associate gave them to him at the table.

Mr. Turtur: That was just as Judge Clark came in, Mr. Rudner, that is the time you got them.

Mr. Rudner: Just a minute, your Honor——

A. Now, please——

Mr. Rudner: I want to talk to the Judge, please.

The Court: You must not insult this witness or any other witness, Counsel.

[fol. 840] A. Now, please, I have taken the X-rays right here at this table and I did not see it before.

Q. And you took the X-rays, Doctor, and studied; how many X-rays did you see?

A. As many as there were, I didn't count them.

Q. And which one did you just now refer to when you looked at it on the stand?

A. I saw all these X-rays.

Q. Which? Refer to them by dates.

A. 7/6/34; 10/1/35.

Q. And what do those X-rays indicate to you?

A. Indicate pathology at the base on the right side and negative chest on the left.

Q. And what is that pathology?

A. This pathology may be a bronchiectasis, an abscess of the lung or gangrene.

Q. X-rays help you, Doctor, in arriving at a diagnosis, isn't that so?

A. To corroborate, yes.

Q. You also need to examine the patient to corroborate any medical opinion, isn't that so?

A. Yes.

Q. Yes. You didn't examine him in this case, did you?

A. I did not, no.

[fol. 841] Q. You also must get a correct history in order to arrive at a proper diagnosis, isn't that so, Doctor?

A. I got it.

Q. Will you answer my question?

A. I do.

Q. I say you also must get a history to properly make a diagnosis?

A. I must, yes.

Q. There is first an inflammation, I believe you said, through the inhalation of irritating fumes or dusts—an inflammation to what place?

A. To the mucous membrane of the bronchi.

Q. Yes. And the mucous membrane of the bronchi includes what, please?

A. Beg Pardon?

Q. The mouth?

A. The mucous membrane begins from the mouth on until the air vesicles.

Q. Will you please help me Doctor?

A. The mouth, the bronchi, the bronchioles, the nasal passages and the pharynx and everything that——

Q. Then ultimately to the lung, isn't that so?

A. That's right.

Q. In cases of inhalations that is so, isn't it?

A. The mucous membrane is always there whether you [fol. 842] inhale irritating substances or not, the mucous membrane is always there.

Q. But I mean the ultimate seat is the lung?

A. Everything is the lung, the bronchi are the lung too.

Q. You have to have evidence, do you not, Doctor, of whether a patient is a mouth-breather or not?

A. Evidence.

Q. History, please.

A. A mouth-breather?

Q. Yes. If a person favors breathing through the mouth.

A. If he has a nasal obstruction he breathes through his mouth, yes.

Q. And if he is not a mouth-breather and inhales through the nose, then what do you have in the inhalation of any alkaline substance to cause an irritation to the mucous membrane?

A. If he breathes through his mouth and not through his nose——

Q. I said if he breathes through his nose and not through the mouth.

A. And that is the proper way to breathe.

Q. Yes. Then what occurs, where do you get your irritation?

[fol. 843] A. Irritation? You get it at the nasal passages, at the pharynx and then the bronchi the same way.

Q. And to the lung?

A. Yes, that's right.

Q. Now, Doctor, if a man had been exposed to an inorganic dust which was caustic and alkali over a period of years and the exposure was such that at times, Doctor, the dust was as heavy as smoke, where you couldn't see your fellow man beside you or at the other end of the building, and that thereafter there was an irritation of the skin time in and time out and treated for it and a cough developed after the irritation to the skin——

A. After the irritation a cough developed, after the irritation to the skin?

Q. Yes.

A. I never heard such a thing.

Mr. Rudner: Just take the question, Doctor.

Q. Irritation of the skin, Doctor, preceded the development of the cough.

A. Oh, I see.

Q. Is that clear now?

A. Yes.

Q. And this cough became progressively worse, is it your [fol. 844] answer, Doctor, that if this man worked for a period of five years, excepting the times when he was out with this dermatitis, that the inhalation of these caustic powders had absolutely no effect upon the mucous membrane of the bronchi and also to the lung?

A. I will explain that before I answer it.

Q. I don't want an explanation, Doctor; my question calls for is it your opinion.

A. No, I cannot answer it. I want to answer with an explanation.

The Court: Go ahead.

Q. Well, you will get a chance through your counsel, please.

A. Now, if this man——

Mr. Turtur: Your Honor, may I have an answer please?

The Court: I will let him answer in his own way.

Mr. Turtur: But my question doesn't ask for an explanation, I gave him the facts.

The Court: I never heard that a witness couldn't explain his answer, particularly an expert. You may answer.

A. Now, the fact is that this man had inhaled caustic [fol. 845] substances for five years and you don't see it in the X-ray. I am of the opinion that the man has developed a tolerance for that caustic. I personally could go in any plant where there is smoke and I will begin to cough very readily. The man that works in the smokey room——

Q. Not smoke, Doctor.

A. No, in a dusty room that you cannot see your hand, may develop a tolerance and his condition may adapt itself so that no harm will be done to him, which emphatically shows in this X-ray that no harm was done.

Q. Supposing he doesn't develop a tolerance, then what Doctor?

A. Then I would see a great deal of fibrosis, I would see inflammation in the X-ray and there would be pathology all over, but I wouldn't see any bronchiectasis in a type of this——

Q. There are some inorganic substances, powders, that are not soluble in water, isn't that so?

A. Now, I don't know anything about chemistry, I failed in the University on checmistry and I don't know any chemistry.

Q. Did you fail in anything else?

A. I may probably, yes, in many things.

Q. You say you have seen hundreds of cases of silicosis, [fol. 846] anthracosis and other fields of medicine where the inhalation of dust was involved?

A. To correct your statement, I was quite calm in saying that I only saw hundreds but I would say thousands.

Q. Thousands, Well, maybe millions.

A. Thousands is correct.

Q. All right. Now that you were quite calm and said that you saw thousands instead of hundreds——

A. Yes, that's right.

Q. —and where the X-rays showed this fibrosis condition, do you know what kind of dust that was that showed on the X-ray?

A. Now——

Q. Do you?

A. It was——

Q. Is that hard, Doctor?

A. I don't.

Q. You don't?

A. No.

Q. Now, do you know whether that dust, that was easily discer-ible upon the X-rays, was or was not soluble in water?

A. That doesn't enter. There is a pathology in that chest that I see but there is no pathology here.

[fol. 847] Q. I didn't ask you that, I am speaking now whether or not the X-rays into the thousands that you saw——

A. Yes.

Q. —where you saw this fibrotic condition, I am asking you whether you know that the powder that was inhaled and that you saw upon these X-rays, I am asking you whether you know whether that powder was soluble or insoluble in water.

A. No, I didn't go into that.

Q. You didn't know that?

A. No.

Q. Does it make any difference, Doctor, if the inhalation of the fumes of the dust is soluble, easily soluble in water, with reference to any diagnostic thing from the X-rays?

A. No, not at all.

Q. No difference at all?

A. No, the only thing is this: if a pathology is there, that's all we are concerned about.

Q. But I am concerned, Doctor——

Mr. Rudner: Well, the Doctor answered you.

A. Now, please. You have asked me a question, I am answering it.

Q. Doctor, I am asking you a question, if you don't [fol. 848] mind.

Mr. Rudner: The Doctor is answering it.

Q. I am referring now merely to the soluble or insoluble substance with reference to the X-ray findings.

A. If the irritating substance, whether it is soluble or insoluble, whether it is a hard substance, whether it is large or small, if it doesn't cause any pathology, the question is: is there pathology in that particular patient or not? If there isn't any pathology, we are not concerned about anything; if there is, I don't know what it is, this irritation caused that pathology.

Q. There is pathology in that lung, isn't there?

A. A bron-iectasis, which is not due to any inhalation or dust.

Q. Why did you say before that you didn't know whether this was a bronchiectasis, a gangrene or a lung abscess?

A. I took the first one; I say bronchiectasis, grangrene or lung abscess.

Q. Well, do you know now what it is?

A. I don't I said that originally, that I don't know and I don't know today.

Q. Why did you just say that this shows a bronchiectasis?

A. The pathology there, this pathology could not be [fol. 849] caused by inhalation of irritating substances—the pathology, I don't call it anything.

Q. Now, Doctor, I am going to ask you if you will be so kind as to answer——

Mr. Rudner: I think the Doctor has answered the question. The Doctor says any irritating substance, soluble or insoluble.

Q. Is coal dust an alkali or not?

A. I don't know, I couldn't tell you.

Q. Is that an organic or inorganic substance?

A. It is organic, I think.

Q. Organic?
A. Yes.
Q. Coal dust?
A. I am not analyzing it.
Q. And you are a specialist for how many years?
A. Coal dust——
Q. That's all Doctor, no further questions. No further questions.
Mr. Rudner: You said that once, once is enough.

Redirect examination.

By Mr. Rudner:

Q. Doctor, in speaking of the pathology as evidenced by the X-rays with respect to inflammation and fibrosis, you have reference to any irritating chemical of any kind, [fol. 850] whether soluble or insoluble?
A. Yes.

Mr. Turtur: I object to the question, your Honor please.
The Witness: That's all?
Mr. Rudner: Just a moment.

Q. Now, in connection with the embolism of which you speak, which arises from the seat of an operation, can that travel to the lungs?
A. Yes.
Q. What other parts of the system can it travel to?
A. It can travel to any part of the body, to the extreme end of the body.
Q. And how does that get out of the seat of the operation to the other part of the body?
A. It enters a large vessel, a large vein, the femoral or abdominal vein.

Mr. Turtur: Your Honor please, we have been all through this on direct examination. I object to it.
The Court: You questioned his theory that a foreign substance could go through the body; he is explaining how it could.

A. No matter where the circulation is, whether it is [fol. 851] in the toes or in the abdomen or in any part of the body, it must go through the lung; it is carried through the lung to exchange the air in the blood.

Q. And then, of course, if it is carried to the lung it may stop there without going——

A. It may stop in a small vessel if the substance is larger than that vessel and it obstructs it.

Q. And if it is smaller it goes through and goes to another part of the system?

A. If it is large it goes through and goes to another part of the system.

Q. Now, you had a chance to examine these X-rays while sitting at the table for a couple of minutes this morning before being on the stand?

A. That's right.

Q. And to make sure there is no question about it will you please look at those X-rays and let me know whether you notice any fibrotic condition or any other pathology which would suggest any inflammation arising from the irritation of any irritating substances?

A. No fibrotis condition and the apices are clear, both apices are clear.

Q. That's all, Doctor.

[fol. 852] Recross-examination.

By Mr. Turtur:

Q. Doctor, fibrosis is the end result in an X-ray, isn't it?

A. What do you mean by end result, the end result of that irritation? Yes.

Q. And that is the only time that you see it in the X-ray but if it has dissolved or if it has disappeared, then you don't get a fibrotic condition as shown in an X-ray?

A. What dissolves?

Q. I am asking you what would dissolve?

A. Nothing. Fibrosis does not dissolve.

Q. I know fibrosis does not dissolve; what brings about fibrosis?

A. Connective tissue formation is thrown off; it is growing out from the system, white flesh, the same thing when you have a scar, you cannot dissolve that scar unless you use nitric acid.

Q. Will you let me ask you, Doctor: Did you ever have to study any X-ray plates at times for hours before arriving at a conclusion?

A. Hours, no, never.

Q. How about the use of a shadow box, does that help you at all?

A. It makes it a little clearer but I can see just as good with this.

[fol. 853] Q. Without a shadow box?

A. Come over here and see it.

Q. I don't know anything about X-rays, Doctor, I wish I had my X-ray man here.

A. Here, is there any difficulty without a shadow box?

Q. I cannot tell, Doctor, what you want to show me. That's all, no further questions.

The Court: Will you bring that book, Doctor, later on?

The Witness: Yes.

CHARLES T. DAVIS recalled.

Direct examination.

By Mr. Rudner:

Mr. Rudner: I just want to have Mr. Davis testify to certain preliminary questions to lay a foundation for further testimony.

Q. Mr. Davis, on May the 16th of this year Dr. Smyth, Junior, of Philadelphia, made some dust tests at the Grasselli Chemical plant, did he not?

A. Yes.

Q. And were you present when those tests were made?

A. I was.

Q. Now, tell us where those tests were made.

Mr. Turtur: I object, your Honor please, as being in- [fol. 854] competent, irrelevant and immaterial and entirely too remote to the situation.

The Court: What sort of tests, Mr. Rudner?

Mr. Rudner: Actual dust count.

Mr. Turtur: They made it on May 16th, your Honor please, 1936, years after Matey wasn't there any more—three years after.

Mr. Rudner: Have you finished—have you finished? We are going to lay a foundation, sir, by showing the same working conditions as prevailed when Mr. Matey was there.

The Court: All right.

Mr. Turtur: What is your Honor's ruling?

The Court: He may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. They were made on the lower floor of the mix room.

Q. Now, before you leave that, I show you this photograph and ask you whether this photograph accurately represents the situation and condition of that floor at the point now being spoken of at the time Mr. Matey worked at the Grasselli plant.

Mr. Turtur: I object to the question, your Honor please, [fol. 855] because there was a specific representation on the part of Mr. Rudner when the jury went to examine the silicate department that there was absolutely no physical change of any kind.

Mr. Rudner: I am just going to prove by the witness—do you admit it then?

Mr. Turtur: Therefore, your Honor please, any photographs are incompetent, irrelevant and immaterial. If they want to show the physical location of anything in that factory the best evidence is what the jury saw.

Mr. Rudner: I want to mark the spot where the examination too place.

Mr. Turtur: I object to it.

The Court: You many answer.

Mr. Rudner: The gentlemen were there a couple of weeks ago; they may have forgotten.

Mr. Turtur: They saw it. Exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. The testing apparatus was placed——

Q. You had better answer my question first. Is that the photograph?

[fol. 856] Mr. Turtur: Your Honor is allowing it?

The Court: Yes.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

(Question repeated by the reporter.)

A. It does.

Mr. Rudner: I offer this photograph in evidence.

Mr. Turtur: I object to it, your Honor please, on the grounds stated in the objection to the question.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

(Received and marked Exhibit D-3.)

A Juror: What is this room?

The Witness: It is the mix room.

The Juror: Is it the room where there are three or four different landings?

The Witness: That's it.

The Juror: And the hopper above it?

The Witness: That's it.

[fol. 857] The Juror: In other words, the first room that we entered last week?

The Witness: That's it on the ground floor.

The Juror: This is the ground floor?

The Witness: That is the ground floor plant, yes, sir.

Q. Now, mark with this pen where the instrument was placed to take the examination.

A. It may have been a little to the left of that mark there which you cannot see on account of the door.

Q. Was that near the door leading to the furnace room?

A. It was about midway between this door, which you see here, and the elevator pit and back a little bit to the left from that cross towards the door leading into the furnace room.

A. Juror: We understood when we were there last week, your Honor, that that part of the plant was not in operation.

The Court: When?

The Juror: When we were there last week.

The Witness: Sorry, sir, you are talking about the phosphate room.

The Juror: No, the first room we entered that had three or four different landings where the dust was, very little on [fol. 858] the first landing, a little more on the second and quite thick on the third and fourth landings.

The Witness: You mean on the floor or what?

The Juror: On the floor and on the construction about it, the bracing and the lumber and everything that was about it.

The Court: And you say that was not in operation?

Mr. Turtur: No, sir.

Mr. Rudner: The test was taken, your Honor please, at the point near the door where Mr. Matey suggests that dust came through, it was taken there for that particular reason.

The Court: When the plant was in operation?

Mr. Rudner: Yes, when the plant was in operation.

A. This is the silicate department, your first visit, you were there.

A Juror: The mixer.

The Witness: Yes, that was in operation, the whole department was in operation at that time.

The Juror: Not when we were there.

Mr. Turtur: Your Honor, that was not the representa- [fol. 859] tion made, it was not in operation in the mix room.

The Court: When was the test taken, when, what day?

The Witness: May the 16th of this year, when the plant was in full operation.

The Court: It may not have been in operation when you were there, Mr. Juror.

The Witness: Yes, it was in operation.

The Court: It simply means when the test was taken, that's all.

Mr. Geuther: Your Honor, I would like to clarify it. The mix room has to be in operation when the furnace is in operation, that is, it necessarily would be in operation.

Mr. Turtur: Your Honor please, I object to Mr. Geuther getting into this thing until he puts himself on the stand subject to cross-examination.

The Court: What is the question about now?

Mr. Turtur: I ask that that be stricken because Mr. Geuther is not in the plant.

The Witness: That is the fact.

Mr. Turtur: I object unless I am given the opportunity to cross-examine.

[fol. 860] The Court: Stricken.

Mr. Turtur: I have seen it.

The Court: Your statement is stricken too.

A Juror: Your Honor, as I remember when we visited this place there was no evidence of anybody working there, see, nobody working there, no person. Of course, I don't know what's going on, you know, behind the apparatus; everything is apparently—I don't know how to explain it,—in a hopper-like, see, covered up.

Mr. Rudner: Automatic.

The Juror: And there is no person working there at the time.

The Court: Was the mixing room in operation at the time the jury was there, Mr. Davis?

The Witness: It might not have had all the wheels let us say turning to that particular moment but it was in regular normal operation, production was being made. Some particular elevator may have been working that time, another may not have been, I couldn't state, sir.

Mr. Turtur: May I ask a question at this time? You were not there at the inspection.

The Witness: I was not.

Mr. Turtur: And you don't know whether any of the [fol. 861] material was coming in from the silo into the mixing room for the purpose of going into the furnace?

The Witness: No, I don't, I so stated.

Q. At the time the inspection was made——

A Juror: The thing that was brought out was this, that at the time we were there, see, nobody was working there and I believe somebody wanted a sample from a hopper and they couldn't get it at the time from down below, see, and the sample that we took was a sample of a dust residue on one of the landings up above, but I think it is just merely a case of misunderstanding. There may be something going on inside, we don't know; I don't know.

Mr. Rudner: I will have that explained.

The Juror: But as far as anybody working there, nobody was working there at the time.

The Witness: If I may complete the information later I think I can tell you.

Q. Suppose you tell us now what is the operation in the mix room.

A. At the mix room you convey into the mix room from the soda ash scale the soda ash scale is situated right here and there is a screw conveyor running along here [fol. 862] over the top of this mixing drum and you convey by means of this mechanical screw conveyor soda ash from this scale over here and drop it into this mixing hopper.

A Juror: Before you go any further, is there any other source of the mix material for the furnace beside that?

The Witness: One other.

The Juror: Just a minute, I want to know is there any other source of mix material for that No. 3 plant?

The Witness: No.

The Juror: Then, your Honor, I think it is foolish to waste time because No. 3 furnace was in operation and it just happened while we were there, see, some of that stuff came through and so evidently it is foolish to waste the time. There must have been something coming from that mix room to the furnace, otherwise we wouldn't have experienced some of that dust that we did while we were there.

Mr. Rudner: Suppose he describes the operation.

The Court: He has done it once.

The Witness: That operation is a bit spasmodic in here because it is a batch process.

[fol. 863] A Juror: There is no other source?

The Witness: No other source, everything comes from those two points and goes over there.

The Juror: In other words, it doesn't need a man——

The Witness: Most of our apparatus is semi-automatic. He goes there, presses a button, something happens, he goes and presses another button, he is in and out, you may not see him for an hour in here, he is up at the top of the silo or out in the yard, back and forth all the time.

Q. The men do not work in connection with the mixing process?

A. They do work, usually in the form of starting an elevator or weighing a commodity, opening another drum to dump it out, nothing like taking a shovel and shoveling it around.

The Court: Is that enough?

The Juror: That's all.

Q. At the time this particular test was made on this date that you gave us was the mixing apparatus in full peak operation?

A. It was in full operation.

Q. And at the same time was the No. 3 furnace in full operation?

[fol. 864] A. It was.

Q. How about No. 1 and 2?

A. They were shut down and had been for some period.

Q. Now, was a test made on the furnace?

A. There was a test made at No. 3 furnace, charging platform.

Q. And I show you this photograph and ask you whether that is a correct representation of the platform of No. 3 furnace?

A. It is.

Q. At the time Mr. Matey worked there?

A. It is.

Mr. Rudner: I offer this in evidence.

The Witness: For further identification, the test bottle that Dr. Smyth used was placed right at the——

Mr. Rudner: Will you mark it?

The Witness: —at the motor driving the left screw, right about there (indicating).

Mr. Turtur: Of course, we object to all these photographs, your Honor please, the jury has seen the very thing that they are now trying to show by way of a photograph and these photographs are entirely incompetent, irrelevant and immaterial, and also entirely too remote [fol. 865] to show any condition, years after Matey worked there.

Mr. Rudner: I offer this in evidence.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

(Received and marked Exhibit D-4.)

The Court: Proceed, we don't want to waste time having them all looked at again.

Q. When that test was made at that particular point, having regard to Exhibit D-4, was the furnace in peak operation?

A. It was.

Q. At the same time?

A. It was.

Q. Now, where else did you make tests in the silicate department?

A. At the glass bin.

Q. What operation?

A. That is a silicate operation.

Q. What does that mean?

A. Where the crushed glass is stored.

Q. You don't have a photograph of that?

[fol. 866] A. We have not.

Q. Now you go over to the phosphate department, tell me where tests were made there—you were present when the tests were being made?

A. I was present when all the tests were being made. There was one made at the Abbey Mill near the discharge end and between the Abbey Mill and the acidulating tank.

Q. Pick out the photograph, which one it is.

A. It is this one here.

Q. The photograph which I have just presented to you, is that an exact and correct representation of the particular part of the phosphate department in which Mr. Matey worked there?

A. It is.

Mr. Rudner: I offer this in evidence.

Mr. Turtur: Subject to the same objection.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

(Received and marked Exhibit D-5.)

Q. Please mark the spot on Exhibit D-5 where the test was made.

A. The exact spot (indicating). It was within a few feet [fol. 867] of this cross but you cannot exactly see it.

Q. Where else did you make tests in the phosphate department?

A. Down at the filters, at a tank used for receiving the weak liquors.

The Court: Mr. Rudner, can't you proceed with more expedition? We haven't got all summer. Put them all in and put the doctors on.

A. Near that position.
Q. What is the other one?
A. That is another view of where one of the other tests was made, right at the end of this walkway.
Q. We will eliminate that.

Mr. Rudner: I offer this in evidence.

(Received and marked Exhibit D-6.)

Q. Now, in connection with——

The Court: The jury have been there and all we want to know is where the tests were made. If you can state them for the record, I shouldn't think it was necessary to do anything else. Let the record show, "We made five tests, one at such a point, another at such a point."

Q. These tests of phosphate, were they all made at top operations?
A. Yes.
[fol. 868] Q. That is all.

Mr. Turtur: When am I going to cross-examine Mr. Davis, your Honor please?
The Court: Right now if you want.
Mr. Turtur: There was some other cross-examination due from the other day.
Mr. Rudner: That's right.
The Court: All right.

Cross-examination.

By. Mr. Turtur:

Q. Now, Mr. Davis, what are your duties with the Grasselli Chemical Company?

The Court: Now, that isn't cross-examination, Counsel, we have had it three times.
Mr. Turtur: I don't know what he is.
Mr. Rudner: That is because your memory isn't too good.
The Court: Supervisor of the phosphate department and silicate department.

A. I am supervisor of the phosphate of soda department, phosphoric acid department, silicate of soda department, metasilicate of soda, lime, sulphur department, nitric acid, mixed acids and detergents.

Q. Now, Mr. Davis, where does this accumulation of dust come from in D-6?

A. I am sorry, sir, that is not an accumulation of dust, [fol. 869] it is the light from windows or the sunlight which makes the lighter spot upon the photo. You can see there is one there which may be a crack in the building.

Q. Was this place cleaned and swept before these photographs were taken?

A. No, I didn't know they were going to be taken; in fact, I wasn't even present when they were taken.

Q. You don't even know whether they were swept or cleaned—do these floors indicate to you that they were cleaned from its usual condition?

A. I would say it was the usual condition.

Q. That is the usual condition?

A. I would say so, yes, sir.

Q. No white powder in this D-6 at all?

A. I don't recognize any from the photo.

Q. All right, we will leave it to the jury. Now, is this sunlight on the floor too as to D-5 or is that powder?

Mr. Rudner: I don't know that this is material, if they are correct representations at the time they are taken and represent the condition——

Mr. Turtur: This is cross-examination.

[fol. 870] Mr. Rudner: When Mr. Matey worked there, that's all we want from those photographs.

A. This light spot here, you notice, is right near the windows and where sun would be shining in and it makes a lighter spot on the photo which looks to some one maybe like dust but it isn't.

Q. It isn't dust. That is always very clean, never any dust on the floors or any place else with reference to that particular place in D-5?

A. Well, cleanliness is only——

Q. Will you please answer?

Mr. Rudner: Let him answer.

A. I cannot, sir, without an explanation on it. Cleanliness is only by contrast, if you want to contrast that with your home I would say it wasn't clean.

Q. I am talking about the condition at the factory, Mr. Davis.

A. As a factory, it is very clean.

Q. Then you say there is no dust in D-5?

A. No dust, considering that it is a manufacturing factory.

Q. No. I will leave that to the jury too.

The Court: Stop commenting like that, Mr. Turtur, that is not cross-examination.

Mr. Rudner: These remarks are very improper.

[fol. 871] The Court: And most improper. It is the second time you have done it. They will both be stricken.

Mr. Turtur: Very well, your Honor.

Q. Now, will you be so kind, Mr. Davis, as to look at D-4 and I ask you if you see any dust in that picture anywheres.

A. Yes, I can see some.

Q. Where does that come from?

A. That has been an accumulation, particularly here underneath the stoker, which possibly is overlooked in sweeping the floor for weeks, even months.

Q. Does that platform as represented in that picture always remain as clean as you see it in that picture or is there always white dust there when the process of manufacture is in action?

A. Again I must refer to contrast. You will always find dust, there is dust in this room, but considering this is a manufacturing operation I would say there was no dust there. Now, if you came on that platform the early part of this week when you had to pull one of those stokers out, naturally when you do pull one of those stokers out some material drops, and it was that I would call dirty at that time.

[fol. 872] Q. Now, do you note here into the mouth of the funnel does that discharge any dust?

A. Yes, under certain conditions that will.

Q. How many times a day does that discharge dust?

A. That may vary. You may happen to have it several times, maybe two, maybe three or four times a day, and again you may not get it for a month.

Q. And sometimes you get it every five minutes, don't you?

A. You may get it two or three times in five minute periods, yes.

Q. I show you, sir, D-3 and ask you if these floors indicate, sir, that there had been dust and it was cleaned.

A. They don't show that they have been cleaned right prior to taking this photo, no; it is the usual condition.

Q. All right, sir. Now may I have that other photograph, please, the one that is in evidence?

Mr. Rudner: Your Honor, we are going far afield of the particular purpose I called this witness for.

The Court: I think we are wasting time.

Mr. Rudner: Because I am going to call Mr. Davis [fol. 873] later on.

Mr. Turtur: Your Honor stated I was to cross-examine Mr. Davis once and for all.

The Court: What do you want to find out from him?

Mr. Turtur: He said there was no more dust.

Mr. Rudner: I haven't finished my direct examination of Mr. Davis, I am just calling him for a limited purpose at this point.

Mr. Turtur: I thought he was through the other day, your Honor please.

Mr. Rudner: Oh, no, we haven't got beyond the starting.

The Court: Well, I will have to really put some kind of a limit or help you find out what the truth is in the case.

Mr. Rudner: I am going as fast as I possible can, Judge. At this point I called Mr. Davis for the limited purpose of laying the foundation for the next witness.

Mr. Turtur: May I cross-examine him on conditions of dust and then your Honor will permit me an opportunity to cross-examine as to what he brought out in chief the other day?

[fol. 874] Q. Now, Mr. Davis, at the time that Mr. Matey was working there were you always present?

The Court: Of course, he wasn't always present. Please don't clutter up the record.

Mr. Turtur: Well, but your Honor please, he says that these tests were made under the same conditions as when Mr. Matey worked there. That is after all what we have got to find out.

The Court: He didn't say that at all, he couldn't say it. He says that these tests were made with the machinery in operation in the same way that the machinery was in operation when Mr. Matey was attending the furnace, that's all he says, that's all he can say.

Mr. Turtur: What good is this test going to do for us if we don't have the same kind of a condition present when this test is made as when Mr. Matey was working there?

The Court: Unless you show the machinery was operated differently.

Mr. Turtur: The pulleys, there is housings on them now.

Mr. Rudner: There was there too, he said.

The Court: Mr. Davis' testimony, as I understand it, is that these dust tests, which of course, couldn't be made [fol. 875] and weren't made at that time, were made with the machinery operating under the same conditions that the machinery operated at the time that Mr. Matey was working there. That's all they assume to say.

Mr. Turtur: Well, may I cross-examine on that?

The Court: Certainly.

Mr. Turtur: If your Honor doesn't want me to waste time now I will reserve my right to cross-examine later on.

Mr. Rudner: On this particular point, I would rather have it done now.

The Court: Now. Do it now.

By Mr. Turtur:

Q. Do you know whether or not these tests were made with any puffing coming out from furnace No. 3?

A. There was no puffing when we made that test.

Q. There was no puffing?

A. No.

Q. Do you know whether any of the soda ash was falling through where that chain was and where that hole is in that hopper?

Mr. Rudner: We are going to deny that there was any such falling. Ask whether there was any falling first.

[fol. 876] Mr. Turtur: Do you want to ask him the questions for me?

Q. Do you know whether there was any dropping of the soda ash when these tests were made?

A. There was none that I could see, at least, or know.

Q. Then you didn't pay any particular attention?

A. Well, I was paying attention, but something could happen without me seeing it.

Q. And do you know, Mr. Davis, whether in the mix room where this chemical is brought in from the silo into that little opening, do you know whether there was any of that chemical in there or not when the test was made in the mix room?

A. I don't quite get the question.

Q. Right here, sir, there is a—this is a silo, isn't that so?

A. Correct.

Q. What is stored in that silo?

A. Soda ash.

Q. What else?

A. That's all in that silo.

Q. That is all. Now, then, the silo operates by gravitation, I suppose?

A. No, we have pneumatic conveyor worked by air suction, in other words.

[fol. 877] Q. And right in here will you help me, Mr. Davis—right here at the mix room, what does that indicate?

A. That is the mixing apparatus, it is the mixing drum.

Q. Yes, all right. Now, what is that opening in the mix room where it goes into the mixing drum, where this soda ash goes into the mixing drum?

A. This test was made when we were introducing soda ash into that drum which is the worst condition we could have in that mixing room.

Q. What is the worst condition, what does that show when you have the worst condition?

A. That again is comparative; in other words, we would have no condition worse than that in that room.

Q. Well, in that way was it bad at all?

A. Well, I say again that is by comparison.

Q. Well, what is your comparison, please?

A. I would say it was not bad.

Q. Was not bad?

A. Absolutely.

Q. There was a lot of dust evolved, isn't that so?

A. No, there was not a lot of dust.

Q. Well, was the chemical there present?

A. If I may, for the sake of the amount of dust there, say a lot of dust by comparison—I think Dr. Smyth can tell you how much there was; he can do that better than I.

[fol. 878] Q. Will you please answer my question?

A. I am sorry, I was trying to assist you.

Q. Was that chemical present?

A. Yes.

Q. And that was then in the process of manufacture?

A. That soda ash was being dumped into this drum prior to being mixed with sand.

Q. Where does all this dust come from that is deposited on the rafters and the beams and the stairs and that little place around by the side of the silo and the floors and the walls, where does that all come from?

Mr. Rudner: Your Honor please, this is the most beautiful testimony by a lawyer that I have ever heard in my experience. I have——

The Court: I must say you have exceeded the proprieties so often during this trial. That was testimony by you. You are not a witness or under oath.

Mr. Turtur: Your Honor please, this testimony so far, your Honor please, as I have been able to gather it from the witnesses——

Mr. Rudner: No witness has made a statement like that.

[fol. 879] Mr. Turtur: —is that there was dust all over. I will withdraw that, your Honor please.

Q. Is the mix room absolutely tight and no dust of any kind escapes from any of the machinery?

A. It is not perfect, you do get a small amount of dust, yes.

Q. Very small?

A. Yes, very small.

Q. That is all.

Redirect examination.

By Mr. Rudner:

Q. Were those photographs taken at the places—were tests made at the places where Mr. Matey worked?

Mr. Turtur: He says he wasn't there when they were taken.

Mr. Rudner: The tests, he was there when the tests were made.

Mr. Turtur: We are talking about the photographs, your Honor please; he wasn't there, he said.

The Court: What was the fact, please?

A. Mr. Matey never worked in the mix room; he did work on the furnace.

Q. How about the phosphate department?

A. Tests were taken at two points at which he did work and where he worked most of the time outside in the [fol. 880] open air no test was taken.

By Mr. Turtur:

Q. Are you sure, Mr. Davis, that Mr. Matey did not work in the mix room?

A. I am, he was never regularly assigned to that work.

Q. Never regularly assigned to that work but did he ever work in the mix room for over two month periods steadily?

A. No.

Mr. Turtur: Well, I am afraid, your Honor please, then it will be necessary to take some more depositions of Mr. Matey.

Mr. Rudner: Mr. Matey never said a word about working in the mix room.

The Court: I didn't recollect that he had.

Mr. Turtur: He says he worked in the department and here is a note that I have there—I don't like to——

The Court: Is that evidence? No, I really shouldn't think you would like to. I really must insist, Counsel, you confine yourself to the proprieties.

Mr. Turtur: I am limited, your Honor, because my client is not alongside of me to ask him whether things are so or [fol. 881] not. He says he worked all over the silicate department and with the mix room door open, your Honor please.

Mr. Rudner: We made the test in the mix room.

Mr. Turtur: And complained about it and all that. That is all in the evidence.

Mr. Rudner: Have you finished with this witness.

The Court: That's all.

By Mr. Turtur:

Q. You are sure Mr. Matey did not work in the mix room for a period of over two months?

A. I am.

Q. All right, Mr. Davis, pardon me. Do you remember John Hadak?

A. We have two John Hadaks, which one? I remember both.

Q. Well, it was during John Hadak's shift that he worked in the mix room. Does that recall it to your attention now?

A. He never worked in the mix room.

Q. All right, Mr. Davis.

[fol. 882] Henry Field Smyth, Jr., called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Dr. Smyth, to shorten the time will you please state your address and profession and qualify yourself.

A. I am instructor in sanitary chemistry at the University of Pennsylvania. In 1925 I received the degree of Bachelor of Science in Chemical Engineering and in 1934 the degree of Doctor of Philosophy, with major work in hygiene. My teaching duties in sanitary chemistry cover teaching graduate students methods for the analysis of food, air and water, being interested primarily in small amounts of toxic materials. This also includes instruction in safe concentrations of toxic materials and interpretation of findings. In addition I make from time to time determinations of dust and vapors in industrial shops and do research work dealing with the physiological results of inhaling dusts or vapors.

Q. Doctor, on May 16th of this year did you make some tests at our request at the Grasselli plant in Grasselli?

A. Yes, I did.

[fol. 883] Q. Did you make them personally?

A. Yes.

Q. What do you use to make a test? A. I use the Smith-Greenberg impinger apparatus which is accepted as standard by the United States Public Health Service.

The Court: Are you the Smith?

The Witness: No, I am not.

Q. And how long were you making those tests?

A. I made the first test with the apparatus in 1926.

Q. Tell us what this impinger is, what type of contraption it is, how you make the test.

Mr. Turtur: I will admit it is a dust measuring instrument.

The Court: Just explain the principle of how it works.

A. By means of a suction of some kind usually produced with an electrical suction pump the air to be sampled is caused to move very rapidly in a fine stream and strike a plate set perpendicular to its passage of motion, the plate being under water and therefore wet with water. The dust particles because of the high velocity of the air stream, are hurled into the water and held there, the air escaping around the side. Then after the sample has been taken, that is, after a sufficient number of cubic feet of air have passed through the apparatus, the water which [fol. 884] now holds the dust is made to a definite known volume and the dust that is in the water is determined either by count, if the dust does not dissolve, or by some chemical quantitative test, if the dust does dissolve in the water. It is possible to use other fluids than water; alcohol is occasionally used for some particular kinds of dust.

Q. Now I show you these photographs, Exhibit D-3——

The Court: Don't show them, we have all seen them so often.

Q. To make sure that he made tests on those particular spots——

The Court: Let him say so.

Q. Just look at them.

Mr. Turtur: If Dr. Smyth says that that is where they were made they were made there.

Mr. Rudner: I am just verifying the cross-marks, Counsel that have already been put on the photographs.

A. Yes, these pictures represent the points of making the tests and the X's are all within two or three feet of the actual spot where the tests were taken.

Q. Now, did you make tests with respect to the soluble alkali dust at those particular points?

A. I did.

[fol. 885] Q. Now tell us the first test was made where and at what time?

A. The first test was made in the mixing department starting at ten o'clock Daylight Saving Time and was finished at eight minutes, twenty seconds after ten. It was finished at that time because the operations creating large amounts of dust was finished, so it was felt——

Mr. Turtur: What is that? Say that again, please, I didn't get it.

A. I stopped at eight minutes and twenty seconds after ten because the operation creating dust was finished, that is, as I understand it, there is an intermittent operation there of mixing and discharging.

Q. Now, of course later in the day you measured that dust?

A. Yes, that same day about four o'clock in the afternoon determinations were made.

Q. Did you measure the soluble alkali dust at that particular point?

A. I did.

Q. What were your findings with respect to milligrams per cubic foot of air?

Mr. Turtur: I object to the question, your Honor please, and any answer, on the ground that any answer now given [fol. 886] by Dr. Smyth would be entirely too remote.

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

A. I find .146 milligrams per cubic foot of air. That is approximately 1/7 of a milligram. A milligram is one five hundred thousandth of a pound in round figures.

Q. What is the last?

A. One over five hundred thousand parts of a pound in round figure-.

Mr. Turtur: May I have that, Your Honor please, so that I will understand it? What that means, per pound of what, is it the air or chemical? I don't understand it.

The Witness: Counsel, a milligram is a unit of weight which is not familiar to the average person. I was merely trying to translate it into pounds with which most of us are familiar.

(A short recess was here taken.)

[fol. 887] Q. You are giving your answer in terms of cubic feet, Doctor?

A. Yes, those are maximum units.

Q. I meant to ask in terms of cubic meters, that's the way I have it.

A. In those terms the answer is 5.15 milligrams per cubic meter of air.

A. All right. Now, when did you make your next test?

A. My next test was made at the feeding platform of the furnace marked furnace No. 3 on that diagram, lasting from 10:17 to 10:47. The result showed .014 milligrams per cubit meter of soluble alkali dust.

Q. Your next test.

A. The third test was made during the very short intervals while a buggy of glass was being dumped into the storage bin, no indications on this diagram just where that was, whether it was up in this corner. The buggy loaded at the end of the conveyor and was wheeled over tracks over to large storage bins. That lasted only five minutes, starting at 10:56, because the actual dumping required about five seconds, just merely turning a buggy on its side, letting all the glass fall out—the dust cloud was [fol. 888] no longer visible at the end of five minutes. Soluble alkali dust during that five minutes at that point was found to be 7½ milligrams per cubic meter of air.

Q. Those are the only three tests you made in the silicate department?

A. That's right.

Q. Then you went in the phosphate department and made tests. Give us the results of those tests.

A. The first test in the phosphate department was made by the Oliver presses, filter presses. The sampling lasted for twenty minutes, from 11:17 and showed .016 milligrams per cubic meter of air. The fifth test made by the Abbey Mill in the phosphate department, grinding phosphate rock, lasted for thirty minutes, from 11:43 showed .194 milligrams soluble alkali dust per cubic meter of air.

Q. Now, did you check, Doctor, to determine the safe figure of concentration over a period of an eight hour day in connection with these soluble alkalis?

A. I was not able to find in the literature a safe limit for identical alkali material. The nearest I could find was a safe limit for ammonia vapor.

Q. How does that compare?

[fol. 889] Q. Tests by my father—I am not a physician and cannot give medical testimony, taken by——

Mr. Turtur: Just a minute Doctor.

A. I would prefer that my father bring that figure in since he can support it.

Mr. Turtur: I object to his saying what his father says.

Mr. Rudner: He is not saying. He says he prefers that his father give it and you are objecting to his giving it.

Mr. Turtur: He says the only thing he found, your Honor please, if I may refer my remarks to the court, is to something of an ammonia, that he wasn't able to find anything with regard to the same material or substance used in this case.

Mr. Rudner: Now I am going to get it down closer in a minute.

Q. Your figure with respect to ammonia, how does that compare to alkali dust?

A. You mean numerically compared to what I found or compared by action on the body?

Q. Yes, the action in connection with the concentration.

A. The action on the body is identical.

[fol. 890] Q. Is identical?

A. Due to the same type or chemical activity, corrosive alkali.

Q. So that when we speak of alkali dust of the kind you examined that day and of ammonia we have the same effect in so far as concentration is concerned upon the system and the caustic effect?

A. Yes.

Cross-examination.

By Mr. Turtur:

Q. Where did this dust come from, Doctor, that you found in the various departments?

A. From the process of handling the finely ground material.

Q. And where did it come from, please, what particular part of the machinery or what particular part of the process?

A. Why, various small cracks in bins, hoppers, conveyors.

Q. Did you make any test at all when there was a puffing back of the soda ash from the furnace No. 3, Doctor?

A. I saw no such puffing, no.

Mr. Turtur: No questions, no further questions.
The Court: That's all, Doctor. We will adjourn now [fol. 891] until two o'clock.

(Recess.)

Afternoon Session

The Court: Have you got that book, Doctor?
Dr. Fine: Yes, I have.
The Court: May I look at it a minute?

Henry Field Smyth, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

The Clerk: What is your name?
The Witness: Henry Field Smyth. I am the father of the last witness.

Q. I will have to stand up close, the Doctor doesn't hear well.
Dr. Smyth, tell us where you live and your education and general qualifications.
A. Well, I have always lived in or around Philadelphia. My home is in Drexel Hill. I received my medical degree at the University of Pennsylvania in 1897, had about two years of hospital service and a year of post-graduate study in Vienna, and then general practice until 1911. I came back to the University and took a public health degree, [fol. 892] got the degree in 1912. That was the first year it was granted for work in this country. I have been teaching in the University ever since, teaching hygiene, public health, bacteriology, specializing in industrial hygiene, industrial health, teaching and research, conducting a research consulting laboratory in connection with my son, who was the previous witness, known as the Smyth Laboratories, investigating various health problems for industry, for organizations, and we have conducted work for various industries and industrial groups for the Department of Labor of the State of New Jersey, for the Department of

Labor and Industry of the State of Pennsylvania, for the National Safety Council. During the war I had a commission in the Public Health Reserve on active duty as past assistant surgeon, controlling industrial health conditions in the munitions industries, in the districts around this part of the country, Philadelphia and New Jersey. I am a member of the Advisory Health Committee of the National Safety Council, have been since its organization.

Q. That is enough, Doctor. Doctor, having regard to soluble alkali dust have you been able to find any figures giving the maximum allowable concentration for prolonged exposure?

[fol. 893] A. There are no figures that I know of for the alkalis that exist as dust. The nearest approach to that are the figures for continued exposure to ammonia fumes given by Henderson and Haggard.

Q. How close is that ammonia fume to soluble alkali dust?

A. That approximates the same degree of alkalinity and irritation that would, for instance, metasilicate dust mentioned in this case.

Q. Now tell me, Doctor, with respect to ammonia in terms of milligrams, what is the maximum concentration allowable for prolonged exposure?

A. For ammonia fumes?

Q. Yes.

Mr. Turtur: Your Honor——

A. Somewhat over 69 milligrams per cubic meter, 69 and a fraction.

Mr. Turtur: Shall we go into the question of ammonia fumes, your Honor?

A. (Continuing). I think 68 or 69.

The Court: I don't understand.

Mr. Turtur: The witness has stated ammonia fumes are the same effect.

The Court: I heard what he said.

Mr. Turtur: Is your Honor going to permit——

[fol. 894] The Court: Yes.

A. 66 or 69, around there.

Q. What does that mean, Doctor, when you say that that is the maximum concentration allowable, what do you mean by that?

A. That is the maximum safe concentration for a continuous exposure of workmen, that is, day in and day out; throughout the working day; that is not for acute exposure.

Q. Well, now, do you mean this, Doctor, that over——

Mr. Turtur: I object to that—just a minute—let the Doctor tell what he means, please.

Q. All right, boil it down, Doctor, and tell us in plain understandable language what you meant by the statement you just made with respect to exposure.

A. That it is unsafe for a workman to work all day, every day, at concentrations higher than that limit.

Q. And in that limit——

A. That is the upper limit of safety.

Q. In that limit is entirely safe.

A. Yes. That is according to the opinion given by Henderson and Haggard, who are authorities on noxious gases and vapors.

[fol. 895] Mr. Turtur: Your Honor please——

Q. Do you accept that opinion?

A. I do.

Mr. Turtur: I ask that be stricken out because the Doctor is depending on other people's opinions rather than his own.

The Court: Yes.

Mr. Turtur: And then talks about gases of ammonia. I ask that that be stricken, your Honor, please.

The Court: All right.

Mr. Rudner: What is your Honor's ruling?

The Court: Out.

Mr. Rudner: Yes, I heard what your Honor said.

Q. Have you made any such tests yourself, Doctor?

A. We have made tests of a number of materials but none dealing with alkalis of this type, no.

Q. Have you any independent opinion or judgment with respect to it, aside from anybody else's?

Mr. Turtur: I object, your Honor please.

Mr. Rudner: May I finish the question please?

Q. With respect to this concentration figure?

Mr. Turtur: I object to the question, your Honor please, [fol. 896] because the Doctor would have to predicate an opinion on something that he knows nothing about. He says he has never made any test with this type of alkaline substance.

The Court: You may answer.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Did you hear the question, Doctor?

A. Yes. From my personal observation of industrial workers and co-related with work on animals, I would assume that this limit was probably approximately anyhow correct; that is as far as I would say definitely.

Mr. Turtur: Your Honor please——

A. (Continuing). Within the same order of magnitude as we say.

Mr. Turtur: Your Honor please, we are not getting an answer, we are getting a possibility or we are getting an assumption or we are getting a probability for something which is not involved in this case.

The Court: Go on.

Plaintiff's counsel prays an exception, which is hereby [fol. 897] allowed and sealed accordingly.

William Clark. (Sealed.)

Q. And what limit would that be, Doctor, based upon your own opinion and experience?

A. That my own opinions and observations would indicate that Henderson and Haggard's limit was approximately the correct one.

Mr. Turtur: Now I ask that that be stricken as your Honor ruled before.

The Court: Yes.

Mr. Rudner: No, he says from his own experience, his own experience and observation.

Mr. Turtur: He says he has never had any experience and observations with this type of alkaline dust.

The Court: Well, the only witness I discovered who has any you refused to call.

Mr. Turtur: I have refused to call? Which one, your Honor? I haven't refused to call anybody, your Honor please.

The Court: Norris and Landis, seem to be the leading doctors on this disease and the industrial effect of this disease. They live in Philadelphia.

Mr. Turtur: Yes, I told your Honor——

[fol. 898] The Court: Have you tried to get them?

Mr. Turtur: Why, I couldn't bring them here, your Honor, please.

The Court: Have you asked them if they would come? Yes or no, please.

Mr. Turtur: No. Now may I tell your Honor why?

The Court: You are going to say because you couldn't pay them.

Mr. Turtur: That's right, sir.

The Court: But you don't know that they would charge you anything.

Mr. Turtur: Well, I don't think they would come here just for a ride, your Honor.

The Court: You might try.

Mr. Turtur: I will call them on the telephone and see if they will come, your Honor please.

Q. Doctor upon the inhalation of soluble alkali dusts, have you had any experience with respect to the immediate effects upon inhalation?

A. The immediate effect upon inhalation, I have never seen soluble alkali dust in sufficient concentration to produce definite harm. My one experience with alkali inhalation was in connection with ammonia.

Q. And was that over a period of time?

[fol. 899] A. No, that was an acute exposure to a high concentration.

Q. And have you ever heard of a case of injury to respiratory organs arising from the inhalation of metasilicate dust, phosphate of soda dust or soda ash?

A. I have not.

Q. Have you ever read about any such case in your readings?

A. I have not. I have recently had occasion to try and find evidence of harm from internal administration, not by inhalation, of trisodium phosphate but I was unable to do so. I saw in the record several cases reported in New York but on communication with the New York Department of Labor I found that they were cases of dermatitis and not of poison from internal——

Q. Now, Doctor, you read quite extensively periodicals and books with respect to the subject?

A. I do.

Q. Now, Doctor do you know from your experience and observation of the probable effects upon the mucous membrane and the other parts of the respiratory system in connection with inhalation of alkali dusts?

[fol. 900] Mr. Turtur: I object to that, your Honor please, because some dusts are alkali and organic and some are inorganic.

The Court: I have yet to determine now in this posture of the case what your theory of this injury is, Counsel. You started out with the theory that sodium hydroxid was produced and that that was a caustic and corrosive of such a high corrosive property that that brought about the disease. When that theory seemed to be untenable under the chemical testimony, you show me this statement from "Surgical Diseases of the Chest" by Graham, Singer and Ballon, wherein Dr. Norris and Dr. Landis are quoted in brief. I now have the whole book itself. The quotation is somewhat different when read with its context. I am wondering what your theory now is.

Mr. Turtur: My theory hasn't changed any, your Honor please.

The Court: Well, you have adopted two different views of it.

Mr. Turtur: Well, this gentleman is going into——

The Court: Now I am interested and I imagine the jury are interested in getting at the truth.

[fol. 901] Mr. Turtur: That's all I want, your Honor, the truth.

The Court: What is your theory?

Mr. Turtur: Beg pardon?

The Court: What is your theory?

Mr. Turtur: The theory is exactly what the witnesses stated for the plaintiff, your Honor please.

The Court: That is not answering me, because two different sets of witnesses have stated two different things.

Mr. Turtur: You mean one for the defense and one for the plaintiff?

The Court: No, your side.

Mr. Turtur: Well, who are the people that stated two different sets of things, your Honor?

The Court: Well, as I understand it, Dr. Gettler's theory was this severe caustic, which collapsed on examination, that theory, and I won't permit the jury to consider it, and then your other theory seems to be that inorganic dust, irrespective of its alkaline qualities, has this effect.

Mr. Turtur: No, we cannot maintain that, your Honor please. How can we state that?

The Court: You stated just a minute ago you stated it [fol. 902] repeatedly. You even used the work- "inorganic dust" at least fifty times.

Mr. Turtur: Certainly, because soda ash, phosphate soda and the silicate powder, which he was subjected to, are inorganic dusts and an alkali.

The Court: Well, you rely on the sodium hydroxid theory.

Mr. Turtur: I rely on what the witnesses stated before this court and jury and I can only rely on the experts that I have produced, your Honor please.

The Court: Your experts, in my humble view of it, seemed unable to make up their minds to their own theory.

Mr. Turtur: Well, I brought the world's foremost authority in the field of chemistry. I cannot bring anybody else.

The Court: His theory collapsed very abruptly.

Mr. Turtur: I beg to differ with your Honor that his theory did not collapse; he stated to your Honor that what he stated here the first day he was repeating the next day or the following Tuesday.

[fol. 903] The Court: I am not going to argue.

Mr. Turtur: But this gentlemen is going into an entirely different substance, your Honor please.

The Court: That is why I am asking you what your theory is. Do you think it is alkali dust, do you think it is caustic dust?

Mr. Turtur: Your Honor please, we have been told—I don't want to waste your Honor's time—we have been told that soda ash belongs to a corrosive family.

The Court: And that theory I won't permit to go to the jury because Dr. Gettler had to withdraw it.

Mr. Turtur: Dr. Gettler, your Honor please, did not withdraw it.

The Court: Well, in my opinion he did, and as I am the controlling authority——

Mr. Turtur: Well, you are the controlling authority in so far as the law is concerned but not in so far as the facts are concerned.

The Court: I will not permit any theory which has no evidence of it to go to the jury.

Mr. Turtur: Well, Dr. Gettler, did give evidence of it, your Honor please, and I can only rely on the letter that [fol. 904] your Honor still has before you and the evidence which was given.

The Court: His letter turned out to be inaccurate.

Mr. Turtur: Well, his letter did not turn out to be inaccurate, your Honor please.

The Court: Well, I am not going to argue. Go on, please.

A. I have had some experience with the inhalation of alkaline dusts, yes, in the manufacture and use of vitreous enamels that contain, among other ingredients, alkaline silicate material. I have never seen any harm from the alkali in those mixtures to the individual working with them. I have examined a number of individuals, numbering up into the hundreds, who have been using materials of that kind. I have also had experience men using another alkali, which was not soluble, and that is calcium hydroxid lime, hydrated lime. We have used that experimentally in animals.

Mr. Turtur: Your Honor please——

A. Exposing the animals to heavy inhalations of hydrated lime and then inoculate them with tuberculosis organisms and exposing animals previously inoculated, and the only [fol. 905] effect of the lime was apparently some protective action in guarding against the tubercular infection.

Mr. Turtur: Now, I move that all that Dr. Smyth has said be stricken from the record.

Mr. Rudner: Your Honor please, I think it is very helpful.

The Court: You may have an exception.

Plaintiff's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Q. Doctor, assume the inhalation of an alkali dust of an irritating nature, what would be its immediate effect with respect to the respiratory organs?

A. The first effect would be of the exposure to such alkali dust, soluble dust, would be on the conjunctive of the eye; then it would effect irritation of what we term the upper air passages, nose and throat would be intensely irritated;

if it was a soluble dust coming into the nose, it meets an atmosphere saturated with moisture. The individual dust particles would absorb moisture, increase in size and weight, if they don't actually dissolve and are mostly precipitated on the mucous membrane in the nose and throat, causing [fol. 906] whatever trouble they cause there, and concentrations would have to be extremely high to allow a material amount of that soluble alkaline dust to reach the lungs. If they did they would produce primarily a bronchitis, generally distributed throughout the lung, and the response of the lung is increased secretion and immediate dilution of the irritating material and throwing it off and expectoration. It would be either spit out or swallowed.

Q. You have studied pathology too, heaven't you, Doctor?

A. Pathology?

Q. Pathology. You are a pathologist too?

A. Yes, sir, I was one time offered a position as head of the Pathological Department of one of our State universities.

Q. All right. Would it be possible, Doctor, for an alkali dust of an irritating nature to get into the lungs without first irritating the nostrils, the eyes and other parts of the respiratory organs?

A. I don't see how it would; in my opinion, no, unqualifiedly so.

Q. Is there any way of determining, in connection with inhalations, the percentage which a man swallows or gets into the mouth as against the percentage which gets to the nostrils?

[fol. 907] A. Experimental work has been done with insoluble dusts, showing that with the ordinary normal nasal respiration over 50 per cent of the dust particles inhaled are deposited in the nose; from 2 to 10 per cent are swallowed and anywhere from 20 to 40 per cent will reach the lungs.

Q. That is insoluble.

A. That is insoluble dust that does not absorb moisture. That experimental work was reported in 1911 and 1912 in a German journal by Lehman and Sito, Sito was a Japanese; Lehman is one of the leading hygienists of Germany, a man whom I know personally, very honored to meet. If that dust, on the other hand, had been a soluble dust, much less would have reached the lungs; how much would depend upon the degree of solubility of the dust. Now that cannot be determined, how much would reach the lungs, without experimental work, and I know of no such. Evidently it would be materially less.

Cross-examination.

By Mr. Turtur:

The Court: I want to ask you something, Doctor. Do you agree to this statement, "The chronic form of bronchitis is most likely to lead to bronchiectasis and long standing inflammatory process tends to weaken the bron-[fol. 908]chial wall as a result." I will have it read to you again in a minute. "As a result of severe attacks of coughing the weakened wall is unable to resist the pressure of air and hence the bronchi dilate." Would you agree with that? Did you hear it?

The Witness: For my sake, it will not be necessary for her to read it again.

The Court: Well, do y[illegible]e to that?

The Witness: In general, yes. Such bronchiectasis would usually be multiple scattered throughout the lungs under those conditions and they occur with attacks of asthma, they may occur sometimes after severe whooping cough where you have hard, spasmodic coughing with inflammation of the bronchi. There you have some dilatation. They are very rarely, however, single dilatations, that is many of the bronchial walls are weak and they would give way in different parts of the lung, dilate.

The Court: Here is another statement: "At first the dust produces—that is inorganic dust—produces irritation of the mucuous membrane of the upper respiratory tract. Later it induces a sub-acute inflammation of the bronchial mucous membrane and in addition leads to [fol. 909] connective tissue proliferation in the inter-lobular septum."

The Witness: The first part of that statement would apply to many irritating inorganic dusts. The only dusts that lead to characteristic inter-lobular connective tissue proliferations are dusts containing silicate and that gives a characteristic condition known as silicosis. None of the other mineral dusts produce that same condition. When they do produce inflammation they product the chronic bronchitis recognized in an X-ray by thickening of the linear shadows along the tracts of the bronchial tree. That irritation is due to the effect on the mucous membrane. The effect of the silica is due to its getting into the lungs and doing its harm inside the lung.

The Court: If a person has chronic bronchitis can that be shown in an X-ray?

The Witness: A severe case of chronic bronchitis will show in an X-ray as thickening of the linear shadows, the shadows along the larger bronchi, what we call the bronchial tree, when the branching of the bronchis have been illustrated rougly this morning, that might show, yes. [fol. 910] It would have to be a long standing bronchitis; long enough to have produced definite fibrous thickening along those large bronchial tracts. An ordinary case of bronchitis cannot be detected, the acute or sub-acute bronchitis.

The Court: You would agree with Dr. Norris and Dr. Landis that bronchiectasis would follow chronic bronchitis and that chronic bronchitis might be caused by dust irritation?

The Witness: Yes.

The Court: But you would say that if that was the case the bronchiectasis would not be concentrated as it is in this case?

The Witness: Your bronchiectasis would be uniformly distributed generally throughout both lungs and therefore there would be a likelihood of your bronchiectasis occurring here and there scattered through both lungs.

The Court: And not just in one place?

The Witness: Dilatation at one point implies some definite obstruction at that point, which may not have been preceded by any inflammatory reaction at all, inhalation, something of that kind; sometimes after etherization patients may inhale some mucous or food particles which later will set up an inflammation and cause a local abscess [fol. 911] there, bronchiectasis or abscess formation.

The Court: All right.

Cross-examination.

By Mr. Turtur:

The Witness: Would you mind doing as this gentleman did and come up near me?

Mr. Turtur: Doctor, I had to come near you before. You know that, in other matters.

The Witness: I am sorry I have to ask Mohammed to come to the Mountain.

Mr. Turtur: That's all right, you are a mountain, doctor.

Q. Doctor, am I right in stating that the right lung is the favorite side for all kinds of foreign bodies.

A. I think you probably are, yes.

Q. That's right, isn't it?

A. I wouldn't say dogmatically you were, but I know nothing to the contrary and I think it is a reasonable assumption.

Q. You have never made any tests with this soda ash or phosphate of soda?

A. No.

Q. Have you Doctor?

A. No.

[fol. 912] Q. And anything, Doctor, that is irritating to the skin is also irritating to the lung isn't that so?

A. Expected to be, yes, sir, more so.

Q. That's all. Thank you very kindly, Doctor.

Charles T. Davis, recalled.

Direct Examination.

By Mr. Rudner:

Q. Mr. Davis the other day in testifying with respect to this map—

The Court: Mr. Rudner, I think we all know enough about this plant not to need any further elucidation of it.

Mr. Rudner: All right.

The Court: And we know enough about the manufacturing process not to need any more.

Mr. Rudner: I am not going into that, sir.

Q. Mr. Davis, during what period of time were you in actual charge of Mr. Matey as his foreman in the silicate department?

A. May I refresh my memory from my notes, please?

Mr. Turtur: I object to referring to any notes, your Honor. We had it the other day.

The Court: What are we trying to do now?

Mr. Rudner: Mr. Davis was not always foreman.

[fol. 913] Mr. Turtur: We will admit that, your Honor please; their amended answer states——

The Court: What do you want to show now by Mr. Davis? Maybe it will be conceded.

Mr. Rudner: I want to show from Mr. Davis what Mr. Matey did from time to time, I want to show what dust conditions he observed, which is most particular in this particular case in connection with this department and with the phosphate department.

The Court: Well, ask him generally then.

Mr. Rudner: Pardon me?

The Court: Ask him generally, just give the years that Matey was in the various departments and ask Mr. Davis what the dust conditions were there.

Q. You have been, in any event, either foreman of the silicate department while Matey was there or at least supervisor of that department?

A. I have.

Q. During the whole time Mr. Matey was there?

A. He has been under my direction the whole time during his employment by the company.

Q. Now, while Mr. Matey worked on No. 1 and No. 2 [fol. 914] furnaces just tell the court and jury what the dust conditions were in that particular department as regards those two furnaces.

A. Concerning dust it would be erroneous to say that there wasn't any dust but there was a small amount of dust which you find in the best of regulated industrial plants. There cannot be a tremendous amount of loss from dust for this reason, that soda ash and these other commodities spoken of are very expensive commodities; for instance, soda ash itself costs us in our process about 85 cents——

The Court: What is the difference what it cost?

Mr. Rudner: Your Honor please——

Q. Never mind that, just give us the facts without that reasoning.

A. Well, the point is that in our control work we very carefully weigh out the commodities which we use and we also analyze and weigh out the commodities which we sell and we account for what we sell as compared to what we use.

Mr. Turtur: Your Honor please, I thought this gentleman was produced—I am sorry to object, your Honor please—I thought he was produced to show what were the [fol. 915] working conditions of Matey and where he worked.

The Court: Can you tell, Mr. Davis, have you records which show the amount of this soda ash that goes—I don't see how you could—which goes in and after it comes out to show that none escapes as dust?

The Witness: I have records to show what we call yields, our input and output.

The Court: Of soda ash?

The Witness: Yes.

The Court: I thought soda ash went into the making of glass.

The Witness: That is correct.

The Court: How can you tell how much soda ash there is in glass?

The Witness: You analyze the final product for the Na_2O content, relate that back to the Na_2O content that you put in, to the soda ash, and then we try to account for all our losses to find where they are because that increases our efficiency.

The Court: You mean you can show so much soda ash going into the furnace and then you can determine how much soda ash is in the finished product?

[fol. 916] The Witness: Oh, yes; I haven't those complete records here.

The Court: You haven't the records?

The Witness: No, I haven't; they are very voluminous.

Q. Leave that out. During the whole time that Mr. Matey worked in No. 1 and No. 2 furnace did you ever see a dust condition in that plant which was like smoke.

A. No, sir.

Q. Did you ever see a dust condition which was heavy with dust?

A. Not that I would consider heavy, no. There is one thing, Mr. Rudner, when you say like smoke, of course if you have a small amount of soda ash during repair work or an accident, you do get a little wisp of it. We call that smoke.

Q. I am talking about the normal operation.

A. No, not where you would have it evenly distributed as a smoky condition throughout the plant, no.

Q. What would you say with respect to dust from the mix room coming into the furnace room?

A. Negligible.

Q. Are there times in connection with the operation of No. 1 and No. 2 furnace when there are certain discharges [fol. 917] of dust of soda ash from the furnaces?

A. What do you mean by discharges?

Q. I mean it comes out of the bottom, out of the hopper.

A. Out of the hoppers; occasionally in the operation of 1 and 2 furnaces, you had to remove the stokers and in like manner on No. 3 furnace when the water jacket leaks, at that time you interpolate the plate at one end and pull the stoker out, you would get some mixture of sand and soda ash falling therefrom.

Q. But I mean in the ordinary operation.

A. No, there was a direct connection, welded connection on the stokers of 1 and 2 furnaces which we haven't on No. 3. On No. 3 we must pull the whole stoker block out in case of a water jacket leaking. On No. 1 and No. 2 we don't have water jackets.

Q. Now, Mr. Matey ran the No. 3 furnace in 1930; that was a different operating furnace?

A. Yes, that was a continuous type, new furnace at that time.

Q. What do you mean by that?

A. Well, in 1 and 2 furnaces we have what we call a batch type; in other words, we get in the course of 24 hours six charges per day, the cycle being four hours.

[fol. 918] Mr. Turtur: He has gone into that the other day, your Honor please.

Q. Forget about 1 and 2, go to No. 3 now.

A. Well, No. 3 furnace is what we call continuous in that we continuously feed mixture to the furnace and continually discharge molten glass from it.

Q. Was the method of getting the soda ash and sand from the mix room into the No. 3 furnace the same as the operation of getting it into the No. 1 and No. 2 furnaces?

A. The method of getting it into the hoppers, feeding the stokers, is identical. The screw principle is generally the same on both except that the screws on No. 3 furnace are so set on a trolley that you can pull them from the furnace and they are also enclosed in a water jacket entering the furnace; otherwise it is really the same general principle, a little bit different in mechanical structure.

Q. You mean the mixture is made in the mix room, is that it?

A. That's right.

Q. And goes to the chutes, tunnels, over the top of the ceiling?

A. Correct.

Q. Into the hopper of the furnace and is then molten. Now, in connection with No. 3 furnace were there at times [fol. 919] a discharge at the bottom near the platform?

A. When you have the hoppers above the furnace low, that is, not completely full of mix or when you have the silo near the bottom being emptied the soda ash is rather soggy and inclined to be moist and that makes the material in the feed hopper have a tendency to what we call arch over or hang up, and then with hammers once in a while they will dislodge that arch effect and come down and you will get a small amount of material flowing out of the connection between the stoker and the hopper.

Q. How often will that occur?

A. The average on that will be from once in a week to ten days—that is over a long period. From my own personal experience I spend probably an hour and a half in that department each day and I haven't seen that occur for over a year. Some days it may happen two or three times and another time it may go three or four weeks without it occurring. It so happens that the silo was completely emptied last week.

Q. That is not a regular part of the operation?

A. No, we empty the silo as frequently as we possibly can in order to get what we call a cut-off on our crudes as part of our control to find out what happens to our crudes.

[fol. 920] Q. Is it possible to anticipate these discharges?

A. No.

Q. At any time Mr. Matey worked on No. 1 and No. 2 furnace were there ever such holes in the chutes or the upper contraptions which cause dust to pour down on him like rain?

A. No, the housing overhead that conveys that ash is of welded steel construction and nothing could come through it.

Q. Were there any holes in it which allowed it to go through?

A. No, we don't permit any holes in it.

Q. During the time Mr. Matey was on No. 3 furnace were there any holes or any conditions with respect to the tunnel or conveyors which allowed dust to come down like a sieve or a rain?

A. No.

Q. Was there ever a time in connection with any of these three furnaces when the dust came down so heavily that it was a wheel barrowful?

A. No, you never get that amount from overhead.

Q. Did you ever hear of a thing like that before?

A. No.

Q. Did you ever see in connection with any of the furnace platforms dust, accumulations of dust as high as one's knees, up to one's knees?

[fol. 921] A. No.

Q. Is that possible in any of those furnaces?

A. It isn't possible unless you set out with that object in view of doing that and you could make holes in the hoppers just arbitrarily and pour the material there. Further, with an amount like that I certainly would discover it through our yield and cost of material.

Q. Now, in connection with No. 3 furnace what were the activities of Mr. Matey in operating that furnace No. 3? He was the furnace man, was he not?

A. He was the furnace operator.

Q. What assistant did he have?

A. No assistant on the furnaces except in cases of emergency when he would call either what we know as the shift leader or autoclave operator to give him a hand; in cases of emergency or break-down, he would have assistance from anyone that could give it to him.

Q. I am talking about normal manufacturing operations.

A. Oh, normal operation of course is practically automatic, except for the change of burners. Each period of 20 or 30 minutes he shuts off the burners on one side of the furnace, changes a valve, air valve and turns on the burners on the other side of the furnace, and adjusts those burners. In addition to that he watches the discharge end [fol. 922] of the furnace, seeing that the glass is coming out properly, going on the conveyor and being conveyed up to the hopper by the autoclave.

Q. What else does he do in the silicate department?

A. He has various other duties in the way of maintenance and housekeeping in which he is supposed to keep his own area clean- up, painted up and generally maintained.

Q. Would he have anything to do with buggies of the finished product?

A. Yes, if the capacity of the No. 3 furnace, which usually is the case, is high enough that No. 3 autoclave cannot dissolve all the production, we then place some of the glass in buggies and wheel it around on the track to No. 1 or 2 autoclave and this work he generally has the assistance of both autoclaves and the shift leader.

Q. Can you divide up the time in percentages while Mr. Matey was working No. 3 furnace as to where he would be, the particular parts on the platform, the unloading part and other parts?

A. His time spent on the charging platform where the material is fed into the furnace would be approximately [fol. 923] 10 or 15 per cent. In observation of his burners at the sides——

The Court: We went into all that, Mr. Rudner.

Mr. Rudner: This is No. 3, this is a different operation, your Honor please.

The Court: So little different.

Mr. Rudner: I think it is important, your Honor, I don't want to waste time. If the witness will give it very rapidly I think it will be helpful.

A. On the sides, approximately 20 per cent on each side, in the discharge and around 25 per cent and 5 to 10 per cent at the autoclave, and those general platforms in the rear of the furnace.

Q. All right. Now, in the silicate department here there are some yellow markings here called settling tanks: What are they?

A. Well, some are settlers and some are storage tanks. These here are what we call our large settlers. These are our small settlers, or really storage tanks. When the material is first produced it is discharged from the autoclave into these tanks via a pressure-release tank and here is permitted to stand possibly three days or maybe ten days in order to permit the silicate solution to clarify, and from [fol. 924] that point it is stored, dumped over into these storage tanks, according to the grade and quality of the material.

Q. Are these liquids?

A. These are all liquids, in fact our final product, the silicate soda is all liquid.

Q. Now, in this silicate department here, the furnace room, was there ever dust piles high around the sides in the course of a day?

A. No.

Q. Now, there is the metasilicate room here next to the furnace room; is that right?

A. That's right.

Q. That is a separate room?

A. That is a separate room, in this shaded portion here.

Q. That is the brown shaded portion?

A. Correct.

Q. Is there anything manufactured in that room?

A. The metasilicate of soda.

Q. What is that, a powder?

A. It is granular powder.

Q. Did Mr. Matey ever work in the metasilicate room?

A. He never worked there. Now, of course, to be real technical, let's say he was never assigned there for a full [fol. 925] shift's work but there may have been times when he went in here to give say a hand, move a couple of barrels or something like that.

Q. Never assigned to that?

A. Never throughout an eight hour shift.

Q. This blue part square in the center, what is that?

A. That blue part is the actual producing area of the metasilicate where this is used for storage of the finished product.

Q. Were there any dust conditions in this metasilicate room?

A. No. There is a small, as I previously stated, there is a small amount of dust in there that you would get in any manufacturing operation but not what I would call a real dusty condition.

Q. Was the dust ever so thick in the metasilicate room that you couldn't see across?

A. No, I have never seen a time or even heard of such a time when you couldn't stand at the furthest door of this building and see clean through and recognize anybody a distance of 200 or 150 feet.

Q. How about rainy or foggy weather, was there ever a time that the dust was so heavy that you couldn't see?

A. Well, actually, if it was rainy or foggy, the moisture [fol. 926] content of your air would be higher. These dusts both metasilicate and soda ash we have talked about, have a natural affinity for water; there being that water in the air, they would combine with it and also have take place another phenomenon in which the CO_2 of the air would counteract with them to form bicarbonate and become heavier and have a tendency to settle in water. There would be less dust on foggy days than dry days.

Q. There is a door between the metasilicate room and the furnace room?

A. Yes, a door right here below these two openings.

Q. What are these two openings?

A. Doorways, three in here going to this settling housing here, which has been nailed up and this is one here which is in operation. We have a certain grade of silicate which melts at approximately 55 degrees Fahrenheit, at this point here, being close to the storage and we take it through this door and over here into our shipping room.

Q. Is this a separate room, that line? All right.

A. That is a separate room.

Q. Is this a separate room, this filter press?

A. Upstairs this is a separate room, filter press room, [fol. 927] but downstairs these three tanks are in one room.

Q. They are liquid?

A. They are liquids. The materials run from these settling tanks to these tanks prior to be filter pressed.

Q. What are these lines here, next to the metasilicate?

A. That is No. 1 evaporator and that is No. 2 evaporator for the concentration of soda silicate.

Q. Now, these storage tanks, are they in a separate room—one is underground——

A. There is a partition runs down here and this is outlined here which separates the storage of the finished products from the manufacturing operations on this side.

Q. Did you ever see dust pour from the metasilicate room into the furnace room?

A. No.

Q. When was the metasilicate room open?

A. You mean when did we start to produce?

Q. Operations, yes.

A. I will have to refresh my memory from my notes.

Mr. Rudner: This is important, your Honor please.
[fol. 928] The Court: I don't see it.
Mr. Rudner: He has it right at hand.
The Court: What is the importance of any of this? I cannot see it. None of it is disputed. Mr. Davis says there wasn't any dust there; Mr. Matey says there was dust there. That is what I would have expected each one of them to say. What the truth is I don't know.

A. June, 1931, that department started to operate.
Q. How often did the metasilicate room operate?
A. In June, 1931, it operated ten days; July, 16 days; August, 20 days; September, 20; October 23; and then did not again operate until February, 1932, in which it operated 8 days; March 24 days; April 28; May, 28; June, 30; July, 31; August 31; September, 30; October, 26; November, 10; December, 9.
Q. Now, what do you say with respect to the ventilation in the silicate room?
A. I would say the ventilation of the entire department is adequate.

The Court: We know what it was; that is a physical fact.

Q. Now, did Mr. Matey ever complain to you about dust conditions?
A. No.
[fol. 929] Q. Did any employee ever complain to you about dust conditions?
A. No.
Q. Did you ever hear any employee threaten that a man would be discharged if he made a complaint about dust conditions?
A. Absolutely not.
Q. While Matey worked in the silicate department what were his complaints about with respect to physical conditions?
A. I never heard George complain about anything except his itch.
Q. And what do you mean by itch?
A. Well, this rash or whatever you call it he had on his skin, which he claimed troubled him when he was working around the furnace where he perspired freely.
Q. Where was that itch?

The Court: We have had all that.

A. It was principally around his chest area and in his arms.

Q. Any on exposed parts?

A. I never saw any on exposed parts.

Q. Do you remember when he had a carbuncle on his neck?

A. I do.

[fol. 930] Mr. Turtur: Dr. Oleynick gave you all of this, your Honor, as to where it was and what it was and everything else.

Mr. Rudner: Plaintiff went into it pretty thoroughly. All right, I will skip it.

Q. Did he ever complain to you about having a cough while in the silicate department?

A. No, I talked to him many times, he never complained about a cough nor did I hear him cough.

Q. Did you see him quite often in the silicate department.

A. When I was foreman there on working days I would say I never failed to see him on the days that he worked.

Q. The foreman's room in the silicate department, is that right here?

A. Yes.

Q. That is the foreman's office?

A. That is called the departmental office.

Q. Did he ever complain to you about losing weight?

A. No.

Q. Did Mr. Matey ever complain to you about any conditions in connection with the silicate department at all?

A. He never complained about any working condition.

[fol. 931] Q. Did you observe any losing of weight by Mr. Matey?

A. I did not.

Q. Now, you finally transferred him to the phosphate department?

A. Correct.

Q. Why was that?

Mr. Turtur: Well, I object to why.

The Court: He may answer.

A. George complained about his itch being more annoying when he worked around the furnace where there was heat; then when he worked where it was an extremely hot day—and we felt if we could put him in a job where he would be outside—in other words, a cool job, that he would have some benefit from that. That is the reason he was placed on what we call the phosphate rock job.

Q. Did he talk to you about the itch and the condition under which he suffered the itch?

A. Yes, numerous times; in fact, that was a favorite subject when you talked to him.

Q. Did you direct his transfer to the phosphate department?

A. I did.

[fol. 932] Q. Is this the original transfer slip, transfer authorization?

A. This is the original change of rate and change of job authorization which I signed on November 1, 1932.

Q. Is that when the transfer took place?

A. Yes.

Mr. Rudner: I offer that in evidence.

Mr. Turtur: Offer what in evidnece?

Mr. Rudner: The original transfer to the phosphate department on November 1, 1932.

Mr. Turtur: How is that evidential, your Honor please? It is testified to and it is a record that we have no control over.

The Court: If you object to it I sustain it.

Mr. Rudner: I offer it just to fix the date.

(Marked D-7 for identification.)

The Court: What soda ash was there in the phosphate department?

The Witness: Soda ash is used on the other side of the building from where Matey worked for the neutralization of phosphoric acid into disodium phosphate.

The Court: Did he have any contact with it at all?

[fol. 933] The Witness: No, sir, not in the phosphate building.

Q. Did Matey ever talk to you while in the silicate department about putting up boxes between the mix room and the silicate room?

A. No.

Q. I think you stated he made no complaints at all to you about dust conditions.

A. No, he did not.

The Court: Do you contend, Mr. Turtur, that he was in contact with soda ash in the phosphate department?

Mr. Trutur: Yes, sir.

The Court: Well, will you show me in his testimony?

Mr. Turtur: Yes, sir.

The Court: What he says on that point.

Mr. Turtur: Page 128, your Honor.

The Court: Wait a minute.

Mr. Turtur: From there on I say——

The Court: Well, I cannot tell from his testimony what he does mean. He says, "While you were doing this operation was there any phosphate of soda dust there"—is that soda ash, Mr. Davis?

[fol. 934] The Witness: No, sir, phosphate of soda is disodium phosphate.

Mr. Turtur: There is a further answer.

The Court: "Sure, because there it was right close beside us." "Right close beside you?" "Yes." "What was close beside you?" "Soda ash that makes the soda."

Mr. Turtur: That's right.

The Court: What does he mean, phosphate of soda?

Mr. Turtur: No, sir, he means soda ash, because the department shows that, right here is where this phosphate rock is dumped in it and in the back of the department there are these large vats for soda ash and they are continuously, according to the testimony of the witnesses,—the soda ash comes over to the top where George Matey was working. If your Honor will read on you will see where he was absolutely subjected to soda ash toward the last part of his employment.

The Court: Do you use the soda ash, Mr. Davis, in the phosphate department?

The Witness: Yes; to neutralize the phosphoric acid.

The Court: Where is that done?

[fol. 935] The Witness: That is done in the phosphate department, the other side from where the phosphoric acid is manufactured where Matey worked.

The Court: Matey never worked there at all?

The Witness: He never worked in that side, no.

The Court: Is that the only place you could come in contact with soda ash?

The Witness: Yes.

Mr. Turtur: What do you mean, your Honor, towards the end?

The Court: In the phosphate department.

Mr. Turtur: No, but he says, your Honor please, if you will read from that page on, "Referring to this soda ash and this phosphate work that you were doing, did that give off any dust?"

"A. Soda ash gives dust and the rock gives a little dust."

The Court: I understand what he said but I am asking Mr. Davis if that is a fact in the plant.

Mr. Rudner: Your Honor, possibly we can show it from this map.

By Mr. Rudner:

Q. I show you this drawing, sketch of the phosphate de-[fol. 936] partment, and ask you to look over it and check it and tell me if that constitutes the correct representation of the phosphate department in its entirety?

A. That is a sketch to scale of the phosphate of soda department.

Mr. Rudner: I offer that in evidence. Now, it might help matters if Mr. Davis just told in his own way what Matey did from start to finish in that department.

(Sketch is marked Exhibit D-8.)

A. For approximately four days out of the week, Mr. Matey was assigned to a job right here, which is outside of the department, on the south end approximately 300 feet from the water front. Rock was brought over on this tram track here, weighted on the scale here and he recorded the weights and then he dumped the rock into this elevator pit where it was lifted to the tank.

Q. Now, these photographs, do they represent the outside of that plant, the phosphate department?

A. This is that scale which shows very plainly there the elevator pit is just to the left of this upright of the scale.

Mr. Rudner: I offer this in evidence.

[fol. 937] Mr. Turtur: Let me see it, will you please?

A. This is the same thing a little further away, giving a more general view of the rock elevator.

Mr. Turtur: Well, your Honor please, the jury saw that and this doesn't represent the true representation from what the jury saw and what I saw.

The Court: Are you testifying again, Counsel? I will declare a mistrial if you do any more testifying.

Mr. Turtur: I don't mean to testify.

The Court: You said "What I saw."

Mr. Turtur: I object to this picture which does not represent a true picture.

Mr. Rudner: Have you seen this?

Mr. Turtur: I object to the picture, if your Honor please.

The Court: On the ground of what you saw?

Mr. Turtur: No, on the ground that it is not a true representation.

Q. Are these correct representations of the physical portions of this outside while Mr. Matey worked there?

A. Yes, with the possible one exception——

Q. What is that?

[fol. 938] A. I don't think when he worked there that upper covering was over the scale.

Q. There was no upper covering?

A. Yes, that shed, or whatever you want to call it, I don't think that was there.

Q. Eliminating the shed is it a correct representation?

A. Yes.

Mr. Rudner: I offer it in evidence with that exception. (Marked D-9 and D-10.)

A. As I stated, he worked approximately four days a week at this position and then——.

The Court: Is there any soda ash near that?

The Witness: No, the soda ash from there, sir, is stored clear over in this position here at the opposite side of the building and is conveyed through closed conveyors to a point here where you have a scale tank and distributor to these hoppers, four in number, directly above these eight soda ash mixers. After the soda ash enters those it becomes a neutral salt chemically known as disodium phosphate, which you frequently take, very mild; one day a week he acted as what we call shift breaker on the Dorr plant in order to keep the hours of the men. We had him [fol. 939] working operating these mills here, two Abbey Mills, the acidulation presses, the thickener presses 1, 2, 3, 4 and these two presses; the operating platforms are these places here in green. At that time he also as a rock man would go into this plaster bin here and take the plaster spoilage on the floor from unloading the trucks and clean that up, keep generally the yard clean in that area.

Q. On this outside operation what did he work with, what material?

A. What is known as Florida pebble phosphate rock.

Q. What is the size of that rock?

A. It varies in size from ⅛ or 1/16 of an inch particles up to approximately ½ to ¾ of an inch. The name implies pebble phosphate.

Q. While he worked in the phosphate department did he at any time handle any soda ash?

A. No, sir.

Q. Did he at any time handle any sodium phosphate?

A. He handled disodium phosphate but never trisodium phosphate.

Q. What is the difference?

A. The difference is this; the disodium phosphate is neutral, what we call neutral; it is neither an acid nor an alkali. Trisodium phosphate is used as a detergent, and [fol. 940] has certain alkalinity properties.

Q. What else did he handle in the phosphate department?

A. At times when the operation at this end of the department was shut down due to certain business conditions or stock conditions, we would give him whatever work we possibly could, always remembering that his condition was such that he didn't want to do laborious work on account of over-perspiration or where any heat was. In other words, we tried to keep him out in a cool place and we did use him in this building across the street commonly known as the storage building, in our storage building, for piling up material, for getting shipments ready, just handling storage.

Q. Any metasilicate in the phosphate department?

A. There is not.

Q. Outside of this place marked in yellow was there any soda ash in the phosphate department?

A. No, that is the only place that soda ash is handled in the department. From this point on it ceases to become soda ash and is this disodium liquor.

Q. Down here it is in liquor form?

A. After soda ash goes in these tanks to neutralize the soda ash you have disodium liquor.

[fol. 941] Q. And the only place it acts as a powder is way back here?

A. Way back here, and these tanks from these batch tanks, you have closed feeder feeding into the soda ash mixers.

By a Juror:

Q. Where does the soda ash come from that is in that large tank, by that I mean, are there any conveyors that come across the forward part?

A. Yes, we reclaim the soda ash from that large tank by a pneumatic conveying system; in other words, suck it out of the tank by air and drop it into a filter at the top of the tank to separate the air from the ash and it gravitates down to this conveyor running across here and to this scale tank there, is weighed and dropped into another right and left conveyor going to these four batch tanks.

Q. But where does it go to to get into that tank?

A. Along the waterfront over in a position over in here. We receive purchases direct from Syracuse, New York, and there again we have a double pneumatic conveying system, we suck it from the barge to a point on shore and from there blow it into the line that comes across here, comes up like this into that silo on that side.

[fol. 942] Q. There wouldn't be any conveyor where Mr. Matey was working in the forward part of that building?

A. No.

By a Juror:

Q. Did he ever work up in that section of the building?

A. No, he never did.

Q. Then what is the purpose of all this? I want to go home too. If he didn't work there, I am just curious why that is brought up, that's all.

The Court: Well, I think I can give the jury the legal reason.

The Juror: If there is a legal reason, all right.

The Court: The legal reason is because the suit was brought at the time when it was brought, Matey has to show that he was in contact with soda ash in this phosphate department, you see, or that he inhaled rather soda ash in this phosphate department. I shall charge you that if he did not do that the suit is barred by the statute of limitations.

The Juror: All right.

The Court: You see, that is the reason for that.

[fol. 943] A Juror: Judge, I wish to ask one question.

The Court: Certainly.

By a Juror:

Q. At the time of the explosion at furnace No. 3 there was evidently a very hot gas that emanated, that caused the jurors, all of them, to cough, so much so that they left the platform and just a few minutes after they left the platform that explosion occurred again. I would like to know what the nature of that gas and that quite a cloud of dust that came out at that time—what is the nature of that dust and the gas?

A. I don't believe there was very much gas there, if any; it was probably the partially combusted fuel oil. In other words, it may have been that you got a sudden surge of oil through one of your burners into the furnace which would introduce a considerable amount of oil and that would sort of puff.

Q. It had nothing resembling the odor of oil, it was quite pungent.

A. Possibly, then the only gas which we get out of this silicate porduction is CO_2, the ordinary gas which you breathe out of your own system as a product of combustion. It is the only gas you can get chemically out of that furnace and of course certain products of combustion which you have in fuel oil.

[fol. 944] Q. Why would it cause us to cough, all of us?

A. I would say that the cough which you had there was due to the inhalation of the soda ash dust. Of course, normally a man who spent a little of his time there, that may have happened, he probably wouldn't even know it until he came back there many times. They are on that platform, as I say, less than an hour a day, five minutes now and five minutes later.

Q. The two explosions occurred within ten minutes.

A. Because at that time this silo was being emptied and we were right down to the bottom. I don't definitely recall but I think about two days later we had an absolute cut-off and that silo was absolutely emptied and that would be hanging up in the hopper.

The Court: Does that answer you, Mr. Juror?

The Juror: I don't wish to dispute Mr. Davis; he is a chemist; I am not, but the gas seemed so pungent; of course, if was quite hot though it had no resemblance at all to any odor of fuel oil.

The Court: Would soda ash have any odor?

The Witness: There is absolutely no odor to soda ash. In this fuel oil you do sometimes get a rather odd pungent odor as the juror has stated.

[fol. 945] The Court: You mean not recognizable,—is it an oily smell?

The Witness: No, it isn't for this reason possibly that furnace inside is roughly 2600 degrees Fahrenheit and when that oil, sudden surge comes in there, it is really a spontaneous combustion and you get certain products you, for instance, don't get in a normal household burner, and the oil is a lower grade of oil, much heavier than you normally come in contact with.

The Court: Go ahead.

By a Juror:

Q. So whenever that furnace discharges there will always eman-te that same odor, or does it just happen that when we were there it happened or will it always happen?

A. It may happen to some extent, it would happen to some extent more or less at all times; of course, you have a draft on the furnace and the extent of that draft governs whether all the products of combustion come out or not. When you have a regular operation you have sufficient draft so that there is a very slight impull in the furnace. We operate it that way for chemical reasons, and when you get a suddent splurge of oil in there you have more [fol. 946] products of combustion than you normally have and a little outpressure. I could demonstrate that, I have done it.

Q. That could be diagnosed as some chemical if that were to be analyzed, couldn't it?

A. Yes, everything is a chemical. Wood is a chemical.

Q. To my knowledge, it was an irritant chemical,—do you agree to that?—that really hurt our nostrils and our mouth.

A. Some products of combustion are particularly—to one that hasn't been acustomed to them. Now, I could go in there and I could probably just sort of notice it and that would be all, it wouldn't be really irritating to me.

By a Juror:

Q. Aren't the sense of smell and taste rather closely allied? I was just wondering is there a taste to this caustic product?

A. There is a rather peculiar taste, somewhat like soap. I think I can explain it best that way. It is pungent, as you say, it is something like when you get a little soap in your mouth, particularly this type of soap such as you use in laundries, yellow soap, sort of that taste.

Q. Well, then, anything we either taste or smell would [fol. 947] probably have to come right from the products that are given off, wouldn't they?

A. Yes, and of course if you smelled it you would get a certain amount in the back of your throat which would give you the taste also.

Q. It was rather pungent and pretty strong when we were there, it was rather strong when that thing blew out.

A. For a second you would get that, the gases probably also came out and shoved it out your way.

Q. The gases from where?

A. From the furnace where the water jackets were. Your probably had a combination of oil influx into the furnace to push the gases out with the dust at the same time.

Q. It seemed to me that when that white dust—it was white dust—came out from the bottom right at the side wheer those hammers are——

A. That is correct.

Q. —and came out, we gagged at either the smell or the taste, I don't know which. That is why I brought up this point of issue, either the smell or the taste was very, very pungent, caused a choking and a coughing. Now, the thing we are trying to find out: is that from the soda ash?

A. I think that was principally free soda ash; there [fol. 948] may have been some fuel oil, combustion oil products also present.

Q. And when this soda ash is heated to a temperature of 500 or 600 degrees what is the chemical change?

A. I am sorry but there isn't any.

Q. The reason I ask, the chemists from the Solvay Products the other day said that was one of the methods of obtaining sodium hydroxid, one was by heating soda ash.

A. When you heat soda ash alone nothing occurs. You can take soda ash alone without any other chemicals and heat it to a temperature of around, well, I will say above two thousand, it just becomes molten and liquid; if you heat it higher it will actually volatilize as soda ash.

By a Juror:

Q. There was a temperature there, you say, of 2600?

A. Yes, but that soda ash in the furnace is in contact with silica. Now, in a molten state silica is a neutralizing agent for soda ash and you neutralize the soda ash with the CO_2 of the soda ash being given off and the sodium silicate added. That, as a matter of interest, is identical [fol. 949] with what they make window glass of, the process is almost identical.

By a Juror:

Q. If I remember right, the testimony might show it and the Judge will probably call it to our attention, that one of the chemists, whether it was the Solvay or Dr. Wiener——

The Court: One chemist said sodium hydroxid could be made at temperature of 500.

The Witness: Dr. Wiener said you could heat soda ash to 500 or 600 degrees and produce caustic but you cannot do it by heating soda ash alone, you have to have other material.

A Juror: I believe the formula he gave at the time was Na_2O.

The Witness: Na_2O is sodium oxide. If you take the CO_2 out of soda ash you have Na_2O.

The Court: Of course, Mr. Jurors, when it is heated that way it is no longer dust.

A Juror: No.

The Court: He did say that, so you are both right in remembering that.

A Juror: Your Honor, you see we are trying to determine what that smell and taste was. If that is from soda ash, that is all we are interested in. Mr. Davis, in the phosphate department were there any furnaces?

[fol. 950] The Witness: No, not of this description. We have a drier which is heated by fuel oil in the phosphate department, which is located here—wait, I am wrong, it isn't at all, it is over this side; it used to be a drier years ago before he came there, since dismantled. It is right here, here is the drier.

By Mr. Rudner:

Q. This large—what we call the storage tank——

A. We call that silo, storage tank bin.

Q. —that is fed from the outside?

A. That is fed from the outside.

Q. Mr. Matey ever work in any bins containing soda ash?

A. No.

Q. Or phosphate of soda?

A. No, we wouldn't put him in any of those bins because it is too hot in there and he had this condition, he complained about the heat troubling him and making it worse and we tried to keep him — as cool a place as possible.

Q. In connection with the chemicals that Mr. Matey did work on, were they in what form, liquid or solid, powder?

A. The phosphate rock which he worked at was like gran-[fol. 951]ular, but the other chemicals were all liquids except over in the storage building where he had the powdered phosphate of soda.

Q. What would you say with respect to the dust conditions in the phosphate department with particular regard to where Mr. Matey worked from time to time?

A. I would say there was no dust.

Q. Never in the outside portions, of course there would be no dust there, would there?

A. No.

Q. Is that near the waterfront?

A. It is about 200 or 250 feet from what we call the sound.

Q. That was how many days a week?

A. Approximately four days a week, he worked five days a week, forty hours. Four of those were spent out in that rock on an average.

Q. Would he work four successive days or one day and then three or something like that?

A. Well, they usually work five days in succession and two days off and five days more. Occasionally there might be a break in that to suit the schedule, a man becoming sick or some other reason.

Q. You said something about the Dorr plant.

The Court: Wait a minute Matey said there was mixing [fol. 952] of soda ash and sulphuric acid.

The Witness: No, sir, we do not mix soda ash and sulphuric acid. I imagine what he was talking about, sir, was at this position here we have what we call an acidulating tank; the phosphate rock comes through these two Abbey mills and is milled there when making phosphoric acid, and goes into the acidulating tank when sulphuric is run into it for acidulation in the preparation of phosphoric acid.

The Court. What does he mean when he says he worked in a bin?

The Witness: I couldn't tell, sir, he may possibly have meant—the only place that I think he possibly would have worked is from where this rock came from a building directly across the street is where the rock is stored and in there we call them storage bays or bins, and he may have occasionally,—because the rock came from there, go over there to see whether the containers were full that were bringing it over or probably help to fill them.

The Court: Was there any soda ash over there?

The Witness: No, sir, that is further away from the soda [fol. 953] ash than even this position.

The Court: He was mistaken, you think.

The Witness: There is no soda ash there.

The Court: The only soda ash is in that tank?

The Witness: Yes, sir, in this part in yellow, the only place where there is soda ash.

Q. And no metasilicate in that department?

A. No metasilicate in that department.

Q. Phosphate of soda, is that liquid or powder?

A. Phosphate of soda may be in a liquid form or a crystalline powder.

Q. Where would it be in a powder if not in that department?

A. This particular process of manufacture, your phosphate of soda does not become a powder—well, it comes out of these machines here, these four machines, as what we call a crystal magma. That is a mixture of liquid and crystal, and then it goes through continuous centrifuge machines located here to wring out most of the water, and then through these driers, and after that it is a crystalline powder somewhat similar to ordinary sugar. It has a rather dampish feeling.

Q. Did Matey ever work there?

A. No, sir.

A Juror: Your Honor, there is one question I would like [fol. 954] to ask Mr. Davis. Mr. Davis, you *you* say as far as these silos are concerned, you empty them at intervales to find out if there is any dampness or precipitate in the soda ash; is that right?

The Witness: The soda ash has no affinity for water; regular soda ash as we purchase it, is known as Na_2CO_3. Now, if you should leave some soda ash here, for instance, on a damp day in particular, that soda ash would change over to $Na_2CO_3\ 10\ H_2O$, which is known as sal soda, which we have used in our kitchens.

The Juror: What I have been trying to get at is this: When you have your silo empty what process do you go about to eliminate the residue that is in the silos?

The Witness: There is no residue left there, it doesn't actually become liquid, it becomes partially moist, but it comes out, as you notice this silo here has a conical bottom, so it flows down, we just tap the side with a hammer and it flows down to a pneumatic conveying system.

The Juror: How about the silo alongside the mixing room?

The Witness: The silicate silo has a flat bottom and when [fol. 955] we get that down where no more will come out we have men go in there and shovel it out into the outlet hole.

The Juror: Did Matey ever do any of that work?

The Witness: No, sir.

A Juror: Wasn't there a building there with a lot of sulphur in it?

The Witness: A building directly across the street.

The Juror: Full of sulphur?

The Witness: That is where we have our coastwise steamers come up. We store both phosphate rock and sulphur in there.

The Juror: What is that sulphur used for?

The Witness: That is used to make sulphuric acid from. It is the same kind of sulphur which you have probably cleaned with if you burned sulphur candles.

Q. In the phosphate department while Mr. Matey worked there, was there lots of dust pouring all around?

A. No, the product is too costly, we couldn't afford to have it floating around and losing it.

Q. Tell us in your own words what the dust conditions are in the phosphate department, in the vicinity where Mr. [fol. 956] Matey worked or anywhere near where it might reach him.

A. I would say they were extremely good. To be real technical, as I say, there is dust in this room here and where he worked would be quite comparable to this room. There would be more dust because it is an industrial process but it wouldn't be anything to the extent where you could look out and see unmistakable clouds of dust. If you could get a sunbeam to come through the air you can trace dust in that particle of sunbeam. Those are things you could do in this room if you had a sunbeam coming in here.

Q. Was it ever as thick as smoke in the phosphate department?

A. No.

Q. What would you say as to the ventilation in the phosphate department?

A. I would say the ventilation is very good and adequate in that building.

Q. During the whole time that you — working at the Grasselli Chemical plant have you ever known of a case of a man sustaining injuries to the respiratory organs in connection with the work in the silicate department?

A. I have not.

[fol. 957] Q. During the period of time you have been with the Grasselli Chemical Company have you ever heard of anybody suffering injuries to the respiratory organs while working in the phosphate department?

A. No, I have not.

Q. Mr. Matey mentioned a Mike Pinkowitz; who is he?

A. Mike Pinkowitz worked in the silicate department. He came there, I think, in 1914, when the department was started, and when I was foreman there he was an assistant of mine; he unfortunately died, I think, about two or three years ago.

Q. He is dead now?

A. Yes.

Q. Did he ever tell you that Mr. Matey was complaining about dust conditions?

A. No.

Q. Did Mr. Matey and a couple of men,—he says "Us three boys came one morning and told Mr. Davis that these pulleys made a lot of dust." Did he or anybody ever tell you about pulleys making dust in the silicate department?

Mr. Turtur: I object to that.

A. I don't see how they could and I don't recall any such thing.

Q. What?

[fol. 958] A. No, they never did.

Q. Did they ever speak to you about covering up the pulleys and putting boxes there?

A. No.

Q. Did Mr. Matey ever call your attention to the fact that there were holes in the conveyors and that there ought to be boxes?

A. No.

Q. Did you ever see or was your attention ever called to the fact that in the silicate department dust came from the conveyors and dropped out and fell on everybody and they ran away?

A. Those conveyors are entirely sealed—no, I cannot conceive of——

Q. Did you ever hear of any such thing?

A. No.

Q. After Mr. Matey had his carbuncle did he ever complain to you about the carbuncle being due to the dust conditions?

A. No.

Q. Did you ever tell Matey, "All right, George, we are going to put fans up there soon and we are going to put a door in the furnace room"?

A. Nothing whatever about fans. I don't know what door he is speaking of, I don't ever recall any such conversation.

[fol. 959] Q. Were there any unusual conditions in the silicate department during foggy weather or moist weather?

A. No. As I previously stated, the dust, if any, would be least on those types of days.

Q. Did he ever work in the silicate department with any caustic powders?

A. We had used caustic soda in the silicate department but he never worked——

Q. In what room?

A. The caustic soda storage tank is on the other side of the building almost diagonally from No. 3 furnace and from there is piped over to the autoclave.

The Court: He doesn't seriously contend he used caustic powder, does He?

The Witness: No, sir, we don't have caustic powder only liquid caustic 50 degrees Baume. There was one thing he did when he was helping around the autoclave where the caustic liquid was running into the autoclave, closing the valve and opening it when he had enough.

Q. That's all.

Cross-examination.

By Mr. Turtur:

Q. You say you don't know of any people that were ever affected with this soda ash powder and treated for the skin or a lung?

A. We have had them treated for the skin but not for [fol. 960] a lung or the respiratory system.

Q. You are sure of that?

A. Absolutely, I don't know of any.

Q. You were not in the department all day long, in the soda ash department, were you?

A. But any man that were treated——

Q. Mr. Davis, please, I won't keep you long, just please answer my question.

(Question repeated by the reporter.)

A. No.

Q. No, you don't know of the condition of the furnaces in that department all day long, do you?

A. Yes.

Q. You weren't there.

A. I know from my contacts with the workmen and from what I actually saw.

Q. Oh, then you are testifying, Mr. Davis, not to what you know but what people told you, isn't that so?

A. Absolutely not.

Q. Well, didn't you just get through stating only a moment ago that you were not in the department all day long?

A. Only in answer to your question am I testifying what people told me.

Q. Then you are depending on what some people told you?

[fol. 961] A. Only for answering that question which you asked me.

Q. Yes. Now, Mr. Davis, in the phosphate department you say Matey worked about right here (indicating)?

A. The purple, yes.

Q. That is so, isn't it?

A. Yes.

Q. And then he would have to go on the inside perhaps eight or nine times a day, isn't that so?

A. Not necessarily. When he worked there his job didn't take him on the inside of the building.

Q. About once every day?

A. He would come up to the top of the tank.

Q. Well, you don't know, do you?

A. I know his duties would not take him inside.

Q. I mean, do you know?

A. Absolutely know what his duties were.

Q. Well, the foreman would know?

A. Absolutely.

Q. Well, if the foreman said that his duties would take him on the inside of that purple place on an average of once every hour eight hours a day when he was working outside, would you say he was correct or not?

[fol. 962] A. Yes, it is possible he went inside to help the other men, if he was called in.

Q. And isn't it possible if he was called in to help the other men that he would work behind this No. 1 thickener?

A. In case of emergency he may be called in to help.

Q. And this elevated walkway, this platform——

A. That is what we call an operating walkway or platform.

Q. Yes. And from this platform, Mr. Davis, from this platform here there are these other three platforms and Mr. Matey would have to work all the way down to where this circle was, isn't that what you indicated before?

A. Not that he would have to, he might be called in.

Q. He did.

A. The days he was operating the Dorr, yes.

Q. Yes, that is what we call the Dorr plant or rather what you call the Dorr plant. Now, this circle to the right, that is about the closest possible proximity to the large soda ash storage tank, isn't that so?

A. Yes.

Q. Now, this soda ash storage tank, when your whole Dorr department is in operation, does elicit quite an amount of soda ash dust?

A. No.

[fol. 963] Q. Are you sure of that?

A. Yes.

Q. And doesn't some of this dust, sir, come over to where this circle is where Mr. Matey worked?

A. No, because there isn't any dust.

Q. There isn't any dust. Why then——

Mr. Rudner: Let him answer the question.

A. There is no dust because when that soda ash has been withdrawn from the tank the tank is under a partial vacuum.

Q. Then why is it, Mr. Davis—withdrawn. Is this soda ash storage tank and around this vicinity here (indicating), is that all white because of white dust particles?

The Court: What do you mean white, are you testifying again, Counsel?

Mr. Turtur: No.

The Court: What do you mean white, on the map?

Mr. Turtur: I mean if it is——

The Court: You didn't say that.

Mr. Turtur: In the vicinity.

The Court: You say why is it, is that your testimony? That is the third or fourth time you have testified. I will [fol. 964] declare a mistrial if you do it any more.

Mr. Turtur: If I said it that way, I am sorry.

(Mr. Turtur's remarks repeated by the reporter.)

Mr. Turtur: "Is that all white." I didn't say it is, I asked him if it is.

A. I would like to give that answer in full, sir.

The Court: Go ahead.

A. At this point here there is a drier in which we dry or dehydrate through a certain process in order to produce from disodium phosphate a stronger grade of phosphate of soda. In other words, the phosphate generally is nearly 60 percent water, water of crystallization. This drier dries that. You still have this phosphate product used for medicinal purposes and this particular anhydrous phosphate of soda we call it, is used a good bit in the making of condensed milk and one thing and another, and also a diluting agent when you make pills, when you just want a little bit of a powerful chemical and use this as a diluting agent because it has no effect, and that drier does give off dust and the dust that you see here is this disodium phosphate dust and any dust in this area is from that drier.

Q. There is dust then?

[fol. 965] Mr. Rudner: Now, let's be fair about the question.

Mr. Turtur: Will you sit down, Mr. Rudner, and let me ask my questions.

Mr. Rudner: I object to your being unfair. That question is unfair. Ask the witness what kind of dust there is.

The Court: The witness has already stated that it is a certain kind. Do you rely on that as an elem-*tn* in producing this injury?

Mr. Turtur: I am relying upon the soda ash, your Hono please.

Mr. Rudner: The witness says there is no soda ash there.

Mr. Turtur: Will you please, Mr. Rudner—may I ask that Mr. Rudner please take a seat, your Honor, please, so that I may continue with my cross-examination?

Mr. Rudner: Go ahead. I am not interrupting you except when I should.

Mr. Turtur: May I proceed, your Honor?

Q. Now, Mr. Davis, there are particles of dust in this area here, are there not, white powder dust?

A. There is no amount of dust there.

Q. No amount?

A. No.

[fol. 966] Q. Is there more of an amount of dust when this department is in operation than when it is not in operation?

A. Well, naturally when you have a large department in operation, men moving about, you would have more dust.

Q. And the day that the jury examined this plant, that department was not in operation, was it?

A. The phosphate end, that end there—yes, that was in operation that day. I think the Dorr plant was shut down. I am quite positive that part was shut down, the other part was in operation.

Q. Also including the place where the soda ash storage tank is stored?

A. Yes, that soda ash tank was in operation that day.

Q. You are sure of that?

A. Yes.

Q. Or are your depending on what somebody else told you?

A. I am sure it was.

Q. You weren't there, were you?

A. I may not have been there that particular minute but I was there that day.

Q. Now, you say that you know of other cases that have been treated as a result of being subjected to soda ash to the skin and irritating conditions of the lung and of the mucous membrane?

[fol. 967] Mr. Rudner: He never said anything about the lung and the mucous membrane.

The Court: He didn't say that. I don't want to hurt your client by continually remonstrating with you.

Mr. Turtur: Well, that is what you seem to be doing, your Honor; every time I want to cross-examine——

The Court: Well, you cannot misquote people, you cannot be unfair.

Mr. Turtur: I don't want to be unfair and I don't mean to be unfair and I want to apologize to the court if that is what your Honor thinks.

The Court: It isn't what I think, the record shows it.

Mr. Turtur: I am cross-examining.

The Court: Cross-examination doesn't permit of your testifying or misquoting witnesses.

Mr. Turtur: I don't want to do that, I don't want to testify and I don't want to misquote.

Q. Will you please tell me what you said with reference to prior cases being treated that had been subjected to the phosphate of soda and soda ash?

A. I stated I never knew of any treatment for lung condition or pulmonary or throat, &c. and so on, but I have known of cases where the men have had treatment for their [fol. 968] hands, they have gotten a cut, for instance, on the hand and got soda ash in it, would have to be treated.

Q. How about people who didn't have any cuts on their hands and go- soda ash in their hands, do you know of treating any of those cases?

A. Not with soda ash alone, no.

Q. None?

A. No, except when they come in contact with a cut.

Q. All right. Do you know Mr. Felix Smietana?

A. We had a man one time Felix Smietana.

Q. You had a man one time Felix Smietana and he was subjected to soda ash dust, wasn't he?

A. He was not.

Q. Didn't he get a skin irritation as a result of subjection to soda ash dust?

A. He did not.

Q. How long ago did that man work for you?

A. I would have to refer to the records. I would say possibly three years ago, four years ago.

Q. You are sure of that?

A. Absolutely.

Q. You are sure of that?

A. Absolutely.

Q. I ask you twice and you said absolutely.

A. Yes.

[fol. 969] Q. Would you be surprised if I told you, sir, that Mr. Felix Smietana of 60 Erie Street, Elizabeth, New Jersey, is still working with you?

A. He is not working with me.

Q. With the Grasselli Chemical Company?

A. Correct, but he is not working with me.

Q. Do you know who Paul Virchek is?

A. Yes.

Q. What happened to him, do you know when he worked in the soda ash department?

A. What do you mean by the soda ash department?

Q. In the silicate department, I beg your pardon, sir.

A. There is nothing that I knew of that happened to Paul Virchek traceable to the silicate department.

The Court: What did happen, if anything?

The Witness: There was something wrong with him sir, but I don't know just exactly the nature of it.

Q. There was something wrong?

A. Yes. He is still working at the plant.

Q. You don't know what that something was—is he still working there now?

A. He is still working there, yes.

Q. Mr. Davis, don't you know that he is confined in the [fol. 970] Bonnie Burn Sanitorium?

A. That must be of recent origin because he was working at the plant.

Q. Well, why did you say he was still working at the plant.

A. Well, he was a short time ago and I don't necessarily know every move that is made.

Q. Do you know how long Mr. Virchek has been confined in the Bonnie Burn Sanitorium?

A. No, I don't.

Q. Then you were mistaken when you said he was still working at the plant, weren't you?

A. Physically working there, yes.

Q. Do you know what became of John Pallay—did you know him?

A. No, I don't know.

Q. Do you know whether he was ever treated for any skin condition or condition of the lungs and of the mucous membrane?

Mr. Rudner: Now, your Honor please, I think these questions should be localized to the soda ash and the other dusts.

Mr. Turtur: He said there was no other condition.

Mr. Rudner: And the other dusts in connection with [fol. 971] which the plaintiff is making his claims. The man may work—I don't know what other departments those people have.

Mr. Turtur: May I proceed?

Mr. Rudner: What department was it?

Mr. Turtur: My information is that they were working in the silicate department.

Mr. Rudner: Ask him that question.

Mr. Turtur: You are trying to tell me what to ask, Mr. Rudner?

Mr. Rudner: Yes.

Mr. Turtur: You are not going to tell me what to ask because you could be told plenty on what not to ask.

Q. Do you remember Andrew Chengeri?

A. No, I don't.

Q. Do you know in what department he worked?

A. No.

Q. You wouldn't say you don't know him, would you?

A. I may not know him by that name; if I saw him I could possibly recognize him and particularly if he worked in my departments.

Q. Well, you won't see him now—I withdraw that. I mean you don't know, you say?

Mr. Rudner: Now, if your Honor please, I think this [fol. 972] is most objectionable. Counsel is making these most improper statements. If it weren't so late in the trial I would ask for a mistrial. I don't want that, I want to finish the trial. In all my fifteen years I have never come in contact with a situation presented by Mr. Turtur.

Mr. Turtur: Well, in the ten years that I have practiced nobody has ever gotten my goat more than Mr. Rudner.

Mr. Rudner: You haven't helped my nerves either.

Mr. Turtur: Yes, sir, and what a trial it is.

The Court: Both very obnoxious statements.

Mr. Turtur: Well, he started it, your Honor please.

Q. Now do you remember, sir, John Pallay?

A. No, sir, I don't.

Q. Not such a good memory as to names?

A. Well, possibly he might have even gone under a different name when he worked for us, but I don't remember that name. Possibly if you could tell me where the man worked and what he did I might remember.

Q. Well, he worked in the silicate department. Does that help refresh your recollection?

[fol. 973] A. He couldn't have worked there very long or I would know him.

Q. You don't know how long he worked there?

A. I say he couldn't have worked there long or I would have known him.

Q. You did know that Paul Virchek worked in that department?

A. Yes, I think somewheres like 19 years.

Q. 19 years?

A. I think so, I am not sure.

Q. And do you know how long Mr. Felix Smietana worked there?

A. Felix only worked in the phosphate department two or three months.

Q. And how long did he work in the silicate department?

A. I don't think he ever worked in the silicate department.

Q. Never. Do you know how recently Felix Smietana was treated for a skin condition while working in the silicate department?

A. I don't think Fexlix Smietana has worked for me in several years.

Q. Are you still at the head of the silicate department?

A. I am.

[fol. 974] Q. How many buildings do you supervise?

A. Phosphate of soda, Q building, silicate of soda, in its entirety, the section for the unloading apparatus at the dock.

Q. How many buildings?

A. I couldn't tell you. You mean in numbers?

Q. Yes.

A. Well, roughly eight.

Q. And how many men do you have under your supervision?

A. Various workmen, varying anywheres from 80 up to 1925, depending upon business conditions.

Q. Now you are pretty well up on the movements of the men, aren't you?

The Court: Well, if you know where these men are, Mr. Turtur, and want to introduce it in evidence, please do so.

Mr. Turtur: I will be very happy to speak to your Honor at side bar with reference to that.

The Court: I don't want it at side bar. If you know where they are——

Mr. Turtur: I do know where they are but I cannot bring them here.

The Court: You can have their depositions taken.

[fol. 975] Mr. Turtur: Unless I may bring Paul Virchek here, your Honor please. He is confined in an institution, your Honor please.

The Court: I understand but if you are inferring that these men acquired this same disease from working in the same plant without being a fact, that would be the most objectionable inference. On the other hand, if it be a fact it would be some evidence in support of your case but it cannot be proved by your asking the witness "Do you know where so and so is."

Mr. Turtur: No, but I am laying the foundation, your Honor please.

The Court: And then naming a sanitorium which everybody in Essex County knows has something to do with the lungs.

Mr. Turtur: There is another gentlemen I mentioned, your Honor please, whom I cannot bring in here because if I did bring him in here something would happen to him.

Mr. Rudner: I object to all these statements.

The Court: I will declare a mistrail on my own motion if you continue this way, Counsel, be fair.

Mr. Turtur: I want to be fair.

The Court: That isn't fair, "something would happen to [fol. 976] him." That is the same as to say, "Gentlemen, this plant has employees that if you brought them in here they would die."

Mr. Turtur: No, not that they would die.

The Court: That was the inference. I will ask any member of the jury if he didn't get that inference.

A Juror: We presumed probably he would lose his job.

The Court: Is that your inference?

Mr. Turtur: Yes, your Honor; otherwise I would bring you in Felix Smietana.

The Court: That is some more obnoxious inference.

Mr. Rudner: Now, your Honor please, I ask your Honor to instruct the jury to disregard all these conversations because it is objectionable and prejudicial.

The Court: Can you bring him here tomorrow, Mr. Davis?

The Witness: I think we can arrange it.

The Court: And you will guarantee no matter what he says it won't affect him.

The Witness: He doesn't work for me at the present time, but that isn't our policy, to conduct ourselves that way.

[fol. 977] Mr. Turtur: He will be here tomorrow morning?

Mr. Rudner: S-ppœnas are available, Counsel. You can bring anybody into court on subpœna.

Q. Mr. Davis, will you be so kind—are you through, Mr. Rudner—will you be so kind as to look at D-2 in evidence.

A. Yes.

Q. Now, will you be so kind also as to refer to that D-2 and tell us what this white represents along this box region for the pulleys?

A. There is unquestionably a collection of dust there through a number of years, probably six years, since that has been cleaned and more.

Q. And will you tell us what this is over here, what does this represent, referring to the part in the picture where one part of the corrugated iron, I believe you call that corrugated——

A. I don't know just what you mean; what do you mean?

Q. What is this white color along here?

Mr. Rudner: Your Honor, may I respectfully ask——

A. Looks like a paint mark.

[fol. 978] Mr. Rudner: —your Honor to instruct the jury to disregard the conversation with respect to other employees because it is merely conversation, not based upon any facts or any statements. I think it is only fairness to ourselves that the jury be instructed——

The Court: They don't have to be.

Mr. Rudner: I don't know but I think it is as well.

Q. Now, is this any powder along the floor region, Mr. Davis?

A. There may be a certain amount of powder there that you would get in any factory but I think that lighter streak is due to some windows back there.

Q. That is the sunlight?

A. I would say it was, yes.

Q. How about the powder along the pipes, Mr. Davis?

A. My same answer holds there. That pipe hasn't probably been cleaned off in six, maybe ten years. It is up in the air and that is an accumulation.

Q. How about this rafter up here?

A. That is an accumulation of a number of years. I couldn't really identify it from this photo.

Q. How often, Mr. Davis, would these men have to clean [fol. 979] up, that worked in the silicate department?

A. Well, places like that, it is hardly feasible that they would ever be asked to clean; they are asked to clean around the floor, immediately in their vicinity. That particular place there, those furnaces haven't been operated in years and naturally there is a heavy accumulation if it is there over a number of years.

Q. How many times a day are they asked to sweep around the platforms of the furnaces?

A. We don't ask them to sweep every time they do it, that is part of their job, they understand it.

Q. And how many times a day do they have to sweep around the platform of the furnace?

A. Unfortunately sometimes it goes for a week or more before they sweep.

Q. Unfortunately.

A. Well, they are not as good at keeping house as they might be. There is dirt accumulation there, they don't sweep every day.

Q. What kind of dirt accumulation was it?

A. You have dirt from the ordinary men dragging around oil, spilling here and there.

Q. Where would the oil come from with reference to the platform to the furnaces?

[fol. 980] A. Your oil control valves are right directly over alongside of the furnace platforms.

Q. They don't come in contact with any of the oil, do they?

A. Oh, yes, the furnace man controls his oil pumps, the temperature of the oil, the oil valves, oil burners.

Q. And you say that they are required to sweep that, that is a part of their job, isn't that so?

A. They are supposed to keep their place clean, yes.

Q. And how many times a day they would be required to do that you cannot say, Mr. Davis?

A. They are not required any number of times, they are supposed to keep it reasonably clean.

Q. Mr. Davis, I would like to ask you please: with reference to this conveyor above the furnaces, is that what you call a conveyor or hopper, which is it?

A. You mean running over the top?

Q. Welded steel construction.

A. That is a conveyor housing.

Q. And in that conveyor housing, Mr. Davis, are there any holes there even down to the present day?

A. No, there are no holes there, I know of no holes.

Q. Are there any holes where that large chain goes up [fol. 981] from the furnace to the housing?

A. I don't know what chain you mean.

Q. Well, there is a chain in that housing, isn't there, that goes into the furnace?

A. Which furnace?

Q. Furnace No. 2.

A. Those are the stoker drives.

Q. How about furnace No. 3?

A. There are no stoker drives up there.

Q. No stoker drives but that welded steel construction, is that all air tight?

A. Oh, no, it isn't air tight.

Q. Well, is that dust tight?

A. Yes, it is dust tight.

Q. Ever any dust come out of there, soda ash dust?

A. No dust would come out of there unless the men leave the door open; there is two doors that open into that, if he left those open there would be a small amount, yes.

Q. Mr. Davis, did you say—if I misquote you please correct me—did you ever say that at no time you ever stored large ~~amounts of~~ metasilicate powder in the metasilicate room?

A. I said we did store it in there.

Q. Oh, you did. Well, loose, I am talking about.

[fol. 982] A. No.

Q. You are sure about that?

A. Absolutely. The minute the metasilicate is made it is produced directly into barrels and those barrels are coopered and set alongside the operation.

Q. And you never have high piles of metasilicate dust?

A. No.

Q. Were you there, sir, when an inspection was made by an expert?

A. I don't recall anything.

The Court: What was the name?

Mr. Turtur: Mr. Pohlman, Lauren V. Pohlman, of Elizabeth, before the jury went there, your Honor please.

Mr. Rudner: Where is he?

Mr. Turtur: I will produce him in time. That is why I am laying the foundation for it now.

The Court: Who is he?

Mr. Rudner: An architect of Elizabeth.

Mr. Turtur: Mr. Pohlman is the gentleman who made the inspection, your Honor please, in conformity with the order of the court when I asked that your Honor give me [fol. 983] an order to permit an inspection and I brought him there for the purpose of looking over the plant to come here and testify.

The Court: He is your witness.

Mr. Turtur: Certainly, I am now laying the foundation, your Honor please.

The Court: What is he an expert in?

Mr. Turtur: He is an expert as a—he is an architect, your Honor please, and he has also had a lot of experience in the field of ventilation.

The Court: Construction engineer, is that what you mean?

Mr. Turtur: Well, if you want to call him that.

Q. That inspection was made on May 11, 1936. Do you know whether or not there was any of that silicate powder there then stored loose?

A. There probably was a pile of silicate soda glass.

Mr. Rudner: Pile of what?

Q. Metasilicate powder, right where the fan was; you know that large fan in the metasilicate room?

A. Now you are talking about the furnace room.

Q. No.

A. You are talking about where they produce their metasilicate?

[fol. 984] Q. Yes, next to the furnace room.

A. In the process of producing metasilicate you bring it out of the graining bowl and store it on drying platform to permit the crystallization to continue and from that point it is milled and placed directly in barrels.

Q. Do you know, sir, whether or not on May 11, 1936 this metasilicate powder was right on the ground floor, on the ground level?

A. At the position which they produce metasilicate.

Q. So that there will be no mistake, where with reference to this diagram is that fan that dries off your metasilicate?

A. Right here (indicating).

Q. Yes, sir. Now, right in this position, sir, do you know whether you ever stored or ever left there metasilicate powder on the ground level?

A. As the metasilicate of soda is produced it is thrown from this graining bowl onto this platform about so high from the floor where the fan can blow air over it to cool it, and further crystallization. It stays there on a matter of a few hours and is then ground and placed directly into barrels. Metasilicate is quite hydroscopic. If you leave it out in the open it will absorb moisture and become insoluble, if they store it there, but that is a step of the [fol. 985] process.

Q. Do they ever store any powder, chemical powder, right here, sir?

Mr. Rudner: Now, your Honor please, let's get to 1928 to 1933. The question, your Honor please, is directed to something the company stored in 1936.

The Court: I don't see the relevancy. What is the relevancy of that?

Mr. Turtur: He says it is never done, your Honor please, and he says the conditions today are the same as they were. That is what Mr. Rudner says. Now, as long as that is never done, then I am laying a foundation so as to bring in my witness.

The Court: Mr. Davis didn't say it was never done, he just said how it was done.

Mr. Turtur: He just said, your Honor please, that it was done and placed upon this platform right here.

The Witness: That is true, that is a step in the process, but it is not a storing of the material. As soon as it is produced it is placed directly in the barrel and stored in the barrel.

[fol. 986] Q. And it is never then left on the floor level, is it, and covered up with bags or burlap bags?

A. There might be an emergency existing where they have a little but it isn't a standard thing.

Q. And when that is done, sir, is this door remaining open?

A. I think you are twisted.

Q. I am not twisted.

A. I believe the time when this man inspected it we had a pile of silicate glass on the floor here.

Q. No, sir.

Mr. Rudner: Yes, yes,

A. This is a door leading outside.

Q. That's right, I know that. That generally is open, isn't it?

A. Yes.

Q. And this door here leading into this room here, that generally too is open?

A. Are you telling me?

Q. Well, is it?

A. No.
Q. Always closed?
A. Yes, we want to keep it closed.
Q. I don't propose to tell you.

Mr. Rudner: You tell everybody else.

Q. That's all, Mr. Davis.

[fol. 987] Redirect examination.

By Mr. Rudner:

Q. I just want you to identify these three pictures as being correct representations of outside at the time Mr. Matey worked there.

A. That is a picture of the most easterly portion of the No. 3 furnace building.

Mr. Rudner: Offer in evidence.
A. This is the most easterly southeast corner of No. 3 furnace building.
Mr. Turtur: What building is that, may I ask?
Mr. Rudner: No. 3 furnace building, outside No. 3 furnace.
Mr. Turtur: Well, outside where?
Mr. Rudner: The building in which No. 3 furnace is contained.
Mr. Turtur: Well, there is four corners to that, your Honor please. I don't know where this is.
The Witness: I am sorry. I told you I said this is the most easterly wall of the No. 3 furnace building, that indentation here, and this is the balance of the wall.
Mr. Turtur: I object to the offer of those pictures because this shows the outside. We are not interested in the outside.
[fol. 988] The Court: It shows the windows too.
Mr. Turtur: I suppose that is what they want to show.
Mr. Rudner: That is what they are intended to show.
The Witness: One of them is the southeast corner.

(Received marked Exhibits D-11 and D-12.)

A. This is the southern wall, almost complete, of the No. 3 furnace section and part of the No. 2 furnace section, showing the oil heater lean-to.

Mr. Rudner: I offer this in evidence.
Mr. Turtur: May I see it before you do?
The Court: Ask him. Is that the last one?
Mr. Rudner: Beg pardon?
The Court: Have you got another picture?
Mr. Rudner: No.

(Received and marked Exhibit D-13.)

Q. That is all, Mr. Davis.

Francis Hammond, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

The Court: Who is this witness, Mr. Rudner?
Mr. Rudner: Mr. Hammond; he is a foreman.
[fol. 989] Q. Mr. Hammond, you are employed at the Grasselli Chemical plant?
A. I am.
Q. How long?
A. Five years.
Q. In what capacity?
A. At the present time I am assistant foreman of the phosphate department.
Q. Were you in charge of the phosphate department when George Matey worked there?
A. I was in charge of the phosphoric acid division of the phosphate department.
Q. Did George Matey work under you?
A. Yes, he did.
Q. Now, tell us what George Matey did in the phosphate department.
A. I suppose I should refer to this map probably.
Q. Yes, if you will.
A. Well, when he first came with the department we put him on the job of what we call rock man and his duties at that time——

Mr. Turtur: Speak a little louder, Mr. Hammond, please.

A. (Continuing:) His duties at that time consisted of weighing and dumping the rock at this point here. He would take these V buggies which were pushed over to this [fol. 990] point by the tram engine, weigh them and dump them into this elevator hopper which consumed about half of his time during the day; the balance of his time he would do ordinary maintenance work such as cleaning up. This is not a correct representation of this portion right here, there is no drier in here at the present time; there is simply a storage bin in there in which the wet b*i*-products from the department is stored or was at the time he worked.

Q. I forgot to ask you this: you are a graduate of what university?

A. Graduate of Pennsylvania State College.

Q. What degree?

A. B. S. Chemical Engineering.

Q. You are a chemical engineer?

A. Yes. And his duties would consist in assisting the truck driver to open the gates and let the stuff fall into the truck, at which time it was hauled away.

Q. What did he handle then?

A. Called plaster or commonly known as gypsum. Then after he worked at that job for a couple of months he was broken in as an operator on this section here, which we call the Dorr plant, phosphoric acid division, and he was used a- shift breaker; he would work about one day a week on that job and his duties consisted of every hour he would visit this Abbey mill here where the rock was fed into the mill. [fol. 991] He would check the weights of the rock going into the mills which consumed probably five minutes, then go along check the gravities in these various thickeners.

Q. Is the Abbey mill, referring to Exhibit D-5?

A. Yes, this is one section.

Mr. Turtur: That is only one section; is that what you said, Mr. Hammond? I didn't hear.

Q. Go ahead.

A. Well, that was practically all of his duties. He would simply check the control on these thickeners and put them on the record, the daily record.

Q. Did you see George Matey often when he worked in the phosphate department?

A. Oh, yes, I was in and about this section continually when I was on duty.

Q. How many days did he spend outdoors?

A. Four out of the five; when he first came there he worked entirely outdoors for a couple of months.

Q. Outside entirely?

A. Yes, until such time as we thought he could maybe work as shift breaker one day only.

Q. After you put him inside how many days did he work outside?

A. Four days outside, one inside.

Q. When he worked outdoors did he have any part of the work inside?

[fol. 992] A. He might occasionally come in here up these steps—anyhow—yes, here is the rock storage tank. He would come up here and at the end of the day, when he had maybe thirty buggies or so, he would go up and see how full the tank was and occasionally if this man inside had an emergency breakdown like a belt broke, he would call him to give him a hand.

Q. The Dorr plant consists of what on the map, the green part?

A. The boundaries of the Dorr plant are right here (indicating).

Q. What chemicals did he work with while he worked in the phosphate department?

A. At this immediate point he worked with phosphate rock.

The Court: The only soda ash used inside is in the tank as indicated. What is that yellow thing?

The Witness: These are what we call the soda ash mixers.

Q. Did he have to work with any soda ash in the phosphate department?

A. No.

Q. Did he work with any metasilicate in the phosphate department?

[fol. 993] A. No metasilicate in this department.

Q. Did he work with any phosphate of soda?

A. He, I believe, worked over here for a few days occasionally, repacking phosphate of soda in this building, which we call the Q building, not shown here.

Q. Now, what would you say with respect to dust conditions in the phosphate of soda department?

A. In the phosphate of soda department, I would say they were all right, I never noticed anything particular.

Q. What?

A. I would say they were all right, in my opinion.

Q. In and about the places where Mr. Matey worked what was the nature of the substance, wet or dry or half wet and half dry?

A. This section here where the rock is dumped outside, right at the foot of the Abbey mill, is dry; all the rest of the plant is wet, damp. They are all liquids from this point on.

Q. How does soda ash get from this tank to this yellow tank?

A. There is a suction system which takes it out of the bottom of the tank, leads it up to the container, and it is fed by a screw conveyor over to this tank.

The Court: We had that from Mr. Davis. Cross-examine.

[fol. 994] Q. Any dust from that operation?

A. No, there is no dust there.

Q. All enclosed?

A. All this stuff is enclosed.

The Court: Cross-examine.

Mr. Turtur: No questions.

By Mr. Rudner:

Q. Just one more question, Mr. Hammond. Did Mr. Matey ever complain to you about a cough?

A. No, he never complained to me about a cough.

Mr. Turtur: He never said he complained to this gentleman, your Honor please.

The Court: I didn't remember that he did.

Mr. Turtur: No testimony by him that he made any complaint.

The Court: That's all right then.

Q. Did you observe him cough at all while he worked under you?

A. No, I did not.

Q. Did you see him very often?

A. Oh, yes, I saw him every day he worked.

Q. That's all from Mr. Hammond.

[fol. 995] Morris Joseph Murphy, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mr. Murphy, are you employed by the Grasselli Chemical Company?

A. I am.

Q. In what capacity?

A. Foreman, silicate of soda department.

Q. What is your education?

A. I am a graduate of the University of Dayton, Bachelor of Science and Chemistry.

Mr. Turtur: Please speak a little louder, Mr. Murphy. I haven't heard you.

A. I am a graduate of the University of Dayton, Bachelor of Science and Chemistry.

Q. What year?

A. 1929.

Q. How long have you been foreman of the silicate department of the Grasselli Chemical Company?

A. I have been in the silicate department since March of 1930.

Q. You were George Matey's foreman?

A. I was.

Q. While he worked in the silicate department?

A. That's right.

[fol. 996] Q. Where is your office and where was your office while George Matey worked there?

Mr. Turtur: I will admit that it is the same place that Mr. Davis pointed to.

Q. Would you always be in the silicate department while you were acting as foreman?

A. That's right.

Q. And what would you do in the silicate department?

A. As foreman of the department I had charge of running it and whatever duties——

Mr. Turtur: Mr. Murphy, please, I cannot hear you back here. Speak up. You are a big, strong fellow.

A. I say as foreman of the department I had the duties of seeing everything ran all right in the department.

Q. Would you actually see the working conditions under which Mr. Matey worked?

A. Yes.

Q. Now, did you go there while he worked on No. 3 furnace or before he worked on No. 3 furnace?

A. He was working on No. 3 furnace when I came there.

Q. What would you say with respect to dust conditions during the period that George Matey worked under you in the silicate department?

A. I would say that there was a little dust, the conditions [fol. 997] under which he worked were very good.

Q. Was there any time during the period of time that he worked under you that dust was as thick as smoke in the silicate department?

A. No.

Q. Did you ever see dust raining or coming down like rain from the conveyors or tunnel?

A. No, I have not.

Q. Did you ever see any holes in the tunnels with dust coming down?

A. No, I don't recall any.

Q. Pardon me?

A. There is no holes in the tunnels.

Q. What are these tunnels made of?

A. Made of sheet steel, welded construction; in other words, it is welded plate, made of light grade steel.

Q. During the time you worked there, during the time that George Matey worked there under you, did you ever see clouds of dust coming from the mix room to the silicate room to the furnace room, I mean?

A. No, I didn't.

Q. While you worked there and George Matey worked there did you ever see clouds of dust coming from the metasilicate room into the furnace room?

A. No, I didn't.

Q. Did George Matey ever complain to you about dust [fol. 998] conditions?

A. No, he did not.

Q. Did he ever speak to you about dust conditions?

A. No, I don't believe he did.

Q. In the operation of No. 3 furnace there is an occasional discharge, is there not, at the bottom near the platform?

A. Yes, there is.

Q. In your experience in past years in the silicate department how does that discharge come about and how often?

A. Well, the discharge is due to the mixture of sand and soda ash that is fed into the furnace arch over the opening, where it discharges into the screw; the hoppers are equipped with mechanical knockers and this arch that is built up will let go. When that goes the part of the hopper below is empty or nearly empty and that material slides down and discharges a little around the sides of the hopper. Now, as to how often it happens I don't believe it happens once a week on an average over a period of time; it may happen two or three times or even more than that within one hour or so until the arch is completely broken down and the hoppers are filled again. It may happen four or five times today and then it may not happen again for a month.

[fol. 999] Q. Can you anticipate these discharges?

A. No, you cannot.

Q. What is your opinion with respect to ventilation of this plant?

Mr. Turtur: Well, I object, this gentleman is not produced as a ventilation expert, "what is your opinion," The jury saw that.

Mr. Rudner: Have you finished—finished? Your Honor please, any man who works in dust can testify on this.

A. I think the ventilation is very good in the silicate department.

Q. Did George Matey ever tell you about having a cough?

Mr. Turtur: He has asked him that; he said no.

Mr. Rudner: I asked him about dust, I haven't asked him about a cought yet.

A. No, he did not.

Q. Did you ever see him cough constantly?

A. No, I did not.

Q. What complaint did he have physically while he was working under you?

A. While working with the silicate he complained of the heat of the furnace, irritating and causing excessive itching on his skin, a rash that he had; in other words, his one complaint was that the heat of the furnace, especially

[fol. 1000]

the hot summer days, caused him more itchiness than at other times and that was his only compalint.

Q. Where did he have his itch?

A. Well, it seemed to be mostly under his arms, as far as I could tell.

Q. That is all.

Cross-examination.

By Mr. Turtur:

Q. Mr. Murphy, does this discharge at this furnace No. 3 happen more often than what you stated on direct examination?

A. No, I do not believe it does.

Q. Does it ever discharge within a period of four or five minutes from the last discharge?

A. Yes.

Q. It does?

A. Yes, it does.

Q. And sometimes that happens more often than others?

A. It would happen, it may happen three or four times within a space of five or ten minutes; then after it is once broken down it would not happen again.

Q. It wouldn't?

A. That's right.

[fol. 1001] Q. Now may I ask you, Mr. Murphy; if you know—you are a chemical engineer, that's so, isn't it?

A. That's right.

Q. Do you recall handing a sample of dust from the mix room to the clerk of this court on the inspection of the factory with the jury?

A. I did not hand a sample to him, the juror got the sample himself.

Q. Well, where did the juror get it, do you know?

A. He went up on the platform in the mix room.

Q. And can you tell us what the chemical composition of that powder was?

A. I cannot.

Q. Well, you are the foreman there, aren't you?

A. That's right.

Q. You are a chemical engineer?

A. That's right.

Q. And you know what kind of chemical substance is used in there, don't you?

A. I do.

Q. What is it?

A. We use sand and soda ash.

Q. You don't use anything else, do you?

A. No, that's all.

Q. In the mix room?

A. That's right.

[fol. 1002] Q. And yet you don't know what that sample was that was taken by a juror, its chemical composition?

A. I can tell you it is a mixture of sand and soda ash, but if you want to know exactly how much I couldn't tell you.

Q. No, but I mean the chemical substance was sand and soda ash?

A. That's right.

Q. That's so?

A. What I take it to be, yes.

Q. Would you be so kind, Mr. Murphy, to tell me what these housings are for?

A. These housings guard four pulleys and four belts. It is a matter of—the housing first is a matter of safety because you have a walkway directly underneath; you have four belts driving along. If anyone of those belts should break or anything it would slop up and come down in the walkway. We have one other—it is a matter of department maintenance. We use a preparation on our belts to keep them from slipping, which accumulates in these housings. In other words, it helps keep the walkway underneath safe and it keeps the department clean.

Q. I see. Well, now, you notice that in this D-2 there is [fol. 1003] a door to each one of those housings, isn't there?

A. That's right.

Q. That is immediately over here?

A. That's right.

Q. Indicating to the door that goes into where the belt is, isn't that so? Now, will you please tell the court and jury what this other little handle is here for, this cone-shape down below, what is that for?

A. That is to catch any little accumulation that comes off that belt.

Q. Accumulation of what?

A. Belt dressing.

Q. Only belt dressing?

A. If there is anything else on the belt it would come off.

Q. Is there ever anything else on the belt?

A. I would say offhand no.

Q. What color is that belt dressing?

A. The belt dressing is practically black.

Q. Practically black?

A. That's right.

Q. And what is the color around these housings?

A. The housings are white.

Q. Well, what is that white from?

[fol. 1004] A. In the first place, the housings are made out of white wood.

Q. They are not painted white, are they?

A. No, they are not painted white.

Q. It is left in its natural state?

A. That's right.

Q. And is there any white around that wood?

A. Yes, there is a little dust here in this corner, it is not actually on the corner.

Q. Well, is there any on the housings here as indicated on the picture?

A. I don't believe it is indicated on the picture.

Q. You don't. Well, what is the white dust around those housings?

Mr. Rudner: Your Honor please, "what is the white dust around those housings."

Mr. Turtur: That is what he said, Mr. Rudner, colored white.

Q. What is that colored white then, if the stuff used for these belts is solid black, almost black as you stated?

A. Well, here, this housing is enclosed. This, as you see, is outside of it.

Q. Yes, on the outside of it. Is there any white color there?

A. Only that the hoppers are white; the housings are [fol. 1005] made white and the lighting effect seems to give it a white appearance.

Q. Only a light effect?

A. Well, I am not an expert in photography but that's the way it appears to me.

Q. That's all Mr. Murphy.

Redirect examination.

By Mr. Rudner:

Q. Referring to Exhibits D-2, how long have those boxes been there, Mr. Murphy?

A. Those boxes have been there before my day; in other words, they were there when I came to work and I couldn't tell you just when they were built.

Q. That's all.

Recross-examination.

By Mr. Turtur:

Q. How often do they clean those housings, do you know?

A. Oh, I don't believe we clean them once every month, maybe three months or something.

Q. What comes out of them?

A. We generally get some belt dressings that forms there, that's about the most that does come out of it.

Q. Is there ever any accumulation, sir, of powder on the little handles in the cone sh*pa*es of these housings?

[fol. 1006] A. There may be very little.

Q. That's all sir. Thank you, sir.

The Court: How many more witnesses, get any short witness?

Mr. Rudner: Some will take longer, some shorter—May I suggest we adjourn until tomorrow morning? I will finish tomorrow morning very definitely.

The Court: You will have to finish this case tomorrow. Have you any other witnesses?

Mr. Turtur: I only have two rebuttal.

Mr. Rudner: Who are they?

Mr. Turtur: Well, I don't think I ought to disclose it at this time.

Mr. Rudner: What is the nature, I mean are they doctors? One is your architect, I suppose.

Mr. Turtur: Well, I think it will be prejudicial to our interests if I tell you now in open court.

Mr. Rudner: I say one is your architect?

Mr. Turtur: One is my architect.

The Court: How long will the others take?

Mr. Turtur: Very short, five minutes.

Mr. Rudher: I don't care who he gets.

Mr. Turtur: I know you don't care but I will let you know tomorrow.

[fol. 1007] The Court: But I want that man. What's his name?

Mr. Davis: Felix Smietana.

The Court: I also insist, Counsel, that you offer evidence with respect to the man in the Bonnier Burn Sanitorium.

Mr. Turtur: Which man, Virchek?

The Court: I don't know who he is.

Mr. Turtur: (To a man in the court room) Mr. Virchek, comes here.

The Court: Is he here now?

Mr. Turtur: This is his nephew and a minister of the Gospel, this gentleman here. Get on the witness stand. May I put him on now, Your Honor?

The Court: No.

Mr. Turtur: All right, you sit there, please. Will this be sufficient, your Honor please, or shall I bring Dr. Runnells or the records?

Mr. Rudner: If your Honor please, these leading statements are very objectionable.

Mr. Turtur: Well, your Honor has just directed me to bring a witness.

The Court: Well, counsel made a statement that it seemed to me at least, Mr. Rudner, had a harmful inference. Now, [fol. 1008] if that inference is fair, of course it should be made; if it isn't fair I am trying to see that it does not remain.

Mr. Rudner: I don't know what this witness is going to testify to. We will tell when he gets on the witness stand. Bring him on.

The Court: Do you want to offer him?

Mr. Turtur: Your Honor please, I am only brin-ing him here at the direction of the court. Now I could either bring Dr. Runnells, who is the gentleman, the medical director, or I could bring the records or I could bring his nephew who is now in court and he can tell that he is there.

Mr. Rudner: We don't deny he is there.

The Court: I don't care where he is, I want to know whether what he has got can be traced to this plant and this department.

Mr. Turtur: Well, the only way I can give it to you is through the medium of other evidence unless we get Virchek himself and he is very sick and cannot come here.

The Court: Better have Dr. Runnells.

Mr. Turtur: Will you have any objection to my putting [fol. 1009] Dr. Runnels on to state what is what?

The Court: He has to trace—I don't know what he has got—you will have to trace whatever he has got to this particular plant.

Mr. Turtur: The only thing Dr. Runnells can do is give you the evidence he received, if you think that is proper legal evidence.

The Court: Dr. Runnells diagnosed him, didn't he?

Mr. Turtur: He diagnosed him now, yes.

The Court: I will excuse the jury until ten-thirty.

(The jury was excused at this point.)

The Court: Now, what is the trouble with Virchek?

Mr. Turtur: I am informed, your Honor please, that Paul Virchek is now confined in The Bonnie Burn Sanitorium with a tubercular condition.

The Court: That is exactly what I thought.

Mr. Turtur: Just a moment, your Honor. And I am also informed that he received skin rashes due to the irritation of this soda ash while he worked in the silicate department and he had that rash for — long time. That is the information [fol. 1010] I have, your Honor.

The Court: You are not contending, however, that tuberculosis is attributable to this soda ash are you?

Mr. Turtur: No, your Honor, except that the defense has put in evidence all the way from Syracuse that no one else was ever treated, that nobody was ever treated as a result of being exposed to soda ash. Now, I bring these gentlemen's names in to show that they have been treated as a result of exposure to soda ash.

Mr. Rudner: Respiratory organs?

Mr. Turtur: Well, you- own Dr. Smyth said whatever is irritating to the skin is more irritating to the lungs.

The Court: Are you trying to show that soda ash dust inhaled is a producing cause of tuberculosis?

Mr. Turtur: I am trying to show, your Honor please, that anybody that is subjected to this soda ash dust is an irritating substance to the skin and when it is irritating to the skin, your Honor please, and when he is forced to inhale it it is detrimental to his health condition from the standpoint of his mucous membrane.

[fol. 1011] The Court: I didn't ask you that. Are you trying to show or infer that tuberculosis is the result or can be the result, either possibly or probably, of soda ash dust?

Mr. Turtur: I say, your Honor please, that when a person is subjected——

The Court: Is that what you are trying to show?

Mr. Turtur: Well, your Honor, I cannot give it to you from the medical point of view.

The Court: Your inference to the jury was an obnoxious one, unless you can support it. There isn't a member of that jury who doesn't know exactly what Bonnie Burn Sanitorium is for, that is if for lung diseases.

Mr. Turtur: That's right. But I ask him, your Honor please, I asked Mr. Davis if he knew where this man Virchek was and he said he was still working for them.

Mr. Rudner: What's the difference?

Mr. Turtur: And then I said—pardon me—"Don't you know he was confined to some institution?"

The Court: You never said it for a special reason?

[fol. 1012] Mr. Turtur: No, it wasn't for a special reason.

The Court: We are not children, Mr. Turtur; we are all grown up and I won't permit it.

Mr. Turtur: May I assure the court that I didn't do it for any reason which was pre*djui*cial.

The Court: You will have Dr. Runnels here, I want to ask him some questions.

Mr. Rudner: Dr. Runnels testified he never heard of a lung injury from soda ash.

Mr. Turtur: He says he has heard of cases where there was subjection to irritating substances.

Mr. Rudner: So that there will be no embarrassment, suppose we ask these questions without the jury being present. I don't want to move for a mistrial. I have just kept back, it has gone too far.

The Court: Yes I think if a tubercular condition cannot be due to soda ash it would be objectionable. I would be very much inclined to grant a mistrial on my own motion if that is the fact.

Mr. Turtur: Your Honor please, we have some informa-[fol. 1013] tion in the book that your Honor sent for, Norris and Landis, page 518, regarding inorganic dust.

The Court: To what effect, saying it produces tuberculosis?

Mr. Turtur: It says, "Evidence that inorganic dust is capable of producing definite pathological changes in the lungs is conclusive."

Mr. Rudner: We had better had this testimony without the jury tomorrow.

The Court: Yes, I think so.

Mr. Turtur: You want Dr. Runnells here at ten-thirty?

(At this point an adjournment was taken to Friday, June 19, 1936, at 10:30 A. M.)

[fol. 1014] Friday, June 19, 1936.

Case Continued.

Appearances as before.

The Court: Is the doctor [illegible]

Mr. Turtur: Yes, your Honor.

The Court: Do you want to excuse the jury?

Mr. Turtur: Does your Honor want the defense to get through first before you call the doctor?

The Court: I hate to keep doctors waiting. Is it agreeable to call the doctor now? Would you retire a moment, gentlemen?

(The jury retires.)

The Court: Now we may repeat this in front of the jury if it is not prejudicial.

John E. Runnels, recalled by the court.

The Court: I mean if it doesn't turn out to be of a character which would necessitate a mistrial we will have it repeated in front of the jury. What is the name of the man now?

Mr. Turtur: Paul Virchek.

[fol. 1015] By the Court:

Q. Have you his records, Doctor?

A. I wasn't asked to bring the records here.

Q. Sorry for that. Do you remember about it?

A. Yes, sir. At the present time he is a patient at our institution.

Q. Yes, I knew that.

A. And has pulmonary tuberculosis in a bad stage.

Q. Did he get it in connection with his occupation?

A. Well, it has never been brought up until the present time. He entered the institution I think May 9th and has tuberculosis, that's all.

Q. Are the lungs in any way affected with dust?

A. No, sir, I would say not.

Q. I mean, in other words, does the etiology—a word I have learned—indicate anything to do with his occupation, his work?

A. Well, the connection, if any, is that he worked for the Grasselli Chemical Company, so he states, and suffered this skin irritation which he stated directly to me that he had and broke down with tuberculosis some time around March and was admitted to the institution in May.

Q. Well, how long had he had the tuberculosis?

[fol. 1016] A. Well, from the state of his lungs at the present time I should say that he had had it for at least a year anyway because he is in a very far advanced condition, but his symptoms, the onset that he first noticed was in March, 1936, and that was a cough and expectoration and night sweats and temperature and this was followed by sputum examination and X-ray. I think he was examined by the company physician and sent to the clinic to us.

Q. Well, you wouldn't state, would you, that any employee of this plant who develops tuberculosis got it from working in the dust?

A. No, sir, I would not. But if you say that tuberculosis can be activated by any condition that would cause an inflammation of his lungs it might be possible; if he had a continuous chronic inflammation or irritation of the mucous membrane of his lungs and bronchi, it is quite possible; that's all I can say.

Q. Wouldn't that show in the condition of the lungs?

A. No, sir. Tuberculosis is a condition that we acquire probably in childhood. It is either cured or remains latent and in later life, when we become subjected to certain influences, it is apt to break down again. That is all we can [fol. 1017] say, either from overwork or infection or inflammation. We know that occupation has an important bearing on the subsequent breakdown because certain occupations have a greater incidence, greater mortality.

Q. Aren't they due to silicosis and anthrocosis and those dust diseases?

A. These are some but still houseworkers are particularly susceptible; the mortality is very great among houseworkers.

Mr. Rudner: Tuberculosis?
The Witness: Yes, sir.

Q. That is due to lack of air, isn't it?
A. Perhaps, so perhaps contact with a germ of course, that causes tuberculosis, but there is no gain saying that occupation has an important bearing on the breakdown in cases of tuberculosis.

Mr. Turtur: Does your Honor want to ask him the history of Paul Virchek, who is the treating physician?
The Court: If it is relevant.
Mr. Turtur: Will your Honor permit me to ask him or do you wish to ask him? I don't want to do anything wrong, you see.
The Court: You cannot do anything wrong when the jury [fol. 1018] isn't here. What I objected to was some of the things you were doing while the jury was here.

By Mr. Turtur:

Q. Doctor, will you be so kind as to tell Judge Clark what the history of this man was with reference to subjection to dust at the Grasselli Chemical Company plant and if you can recall please the particular substance that he told you.
A. Why he said he worked in this soda ash for certain periods and during the summer especially when there was considerable moisture, he had irritation of his skin and a certain amount of cough, but when he was removed from these conditions the skin irritation disappeared and his cough also.
Q. And anything that is irritating to the skin, Doctor, is also irritating to the lung?
A. If it reaches the lung, yes, sir.
Q. Well, does the fact that he coughed while in and about this soda ash department; in the mix room, indicate anything to you?
A. It would seem to me to indicate that he must have inhaled something irritating.

Mr. Turtur: I would like to ask a question or two more, if your Honor please, if there is any connecting cause.

[fol. 1019] The Court: Go ahead.

Q. Does the inhalation of soda ash, Doctor, which is an alkali and inorganic substance which produces a skin rash——

The Court: Don't ask him a long hypothetical question.
Mr. Turtur: Well, I want to make the point, your Honor please, if you will permit, me, whether that has any influence on his present condition.
Mr. Rudner: Any dust rubbing your clothing will give you an itch.
Mr. Turtur: Let's have it from the Doctor whether it will have any influence on his present condition.
The Court: Whose condition?
Mr. Turtur: Paul Virchek.

By the Court:

Q. Do the books, Doctor—I have read a good many books since you were here last and I haven't had the impression that tuberculosis is attributable to dust unless it is preceded by a silicosis or anthracosis or some of those diseases.
A. Well, those are—yes—those are certainly conditions which predispose to tuberculosis but we also know that there are many other factors that also predispose.

[fol. 1020] By Mr. Turtur:

Q. What factors are there, if any, Doctor, that reactivate the quiescent condition?
A. Disease, influenza, such as influenza, pneumonia, bronchitis.

Mr. Rudner: Just a moment, please, Mr. Turtur.
Mr. Turtur: May I at this juncture, your Honor, state this, that the only reason I brought out Mr. Virchek's name was not to show what his present condition was because this is not involved in the case——
The Court: You inferred it.
Mr. Turtur: Pardon me, your Honor——
The Court: You said he was in what we all know to be a tubercular sanitorium.
Mr. Turtur: Yes, but your Honor, you recall that I asked Mr. Davis for the purpose of cross-examination three times whether Paul Virchek was still working with them and he said yes, and it was the third time that I asked him

if he was sure he definitely stated he was sure. Then I asked him, "Would you be surprised to learn if I told you he was not now working for you." Then your Honor [fol. 1021] asked me, "Well, where is he?" I said, "I will be very happy to state, your Hon-r, at side bar so that the jury will not hear it." Your Honor then directed me to state where he was and at your Honor's direction of course I had to.

The Court: I don't think the record will indicate what you say.

Mr. Rudner: It was done quite beautifully.

Mr. Turtur: Well, it wasn't done quite beautifully, your Honor please.

The Court: What is the use of arguing about it? I am not a child, I know why it was done.

Mr. Turtur: But I merely want to state to the court, your Honor please, that it was merely for the purpose of cross-examination of Mr. Davis and to attack his credibility because he definitely stated that Mr. Virchek was working there and the man couldn't have been working there in view of his confinement at the institution.

The Court: What difference would it make whether he was working there for the purposes of this case? We are not children, Mr. Turtur.

Mr. Turtur: Very well, your Honor. I just want to tell [fol. 1022] your Honor why this element was brought up.

The Court: We all know why it was brought up.

By the Court:

Q. This book does not seem to say anything about the etiology——

A. Whose is that, your Honor?

Q. Norris and Landis.

Mr. Turtur: By the way, I tried to get the doctor, your Honor please, and I couldn't get him. There is the telephone number, Lombardy, Philadelphia, 6100.

By Mr. Turtur:

Q. Doctor, did you notice any scars on Mr. Virchek's arms?

The Court: What difference does that make in connection with claim for lung injury?

Mr. Turtur: It is an irritation to the skin, your Honor please, and their own Professor Smyth says anything that is irritating to the skin is irritating to the lung. He said most decidedly so.

Mr. Rudner: And if it is irritating to the lung it must first affect the mouth, nostrils, respiratory organs and [fol. 1023] that has not been shown, not even a suggestion to the nostrils and the mouth.

Mr. Turtur: Well, the cough certainly indicates it.

Mr. Rudner: It might to you but not to anybody else.

The Court: "It cannot be emphasized too strongly that it is impossible to determine the effect of a given occupation as a predisposing cause of tuberculosis without knowledge of where and how the worker lived."

The Witness: That is perfectly true, your Honor.

The Court: Let me see your book.

Mr. Turtur: Your Honor has it, I think.

The Court: No, this is Landis.

Mr. Turtur: Here it is, this is the book that was loaned to me by Dr. Runnels.

The Court: Tell him his colleague tore a page out of it.

Mr. Turtur: Yes, and I am going to get a new book.

The Witness: No, the other doctor ought to get it.

[fol. 1024] Mr. Turtur: I think he should but I don't think he would if I asked him.

The Witness: I will send him a bill.

Mr. Turtur: Try and collect.

The Witness: Expensive book. Perhaps I can find it.

The Court: It doesn't seem to come under etiology.

The Witness: I don't believe this book would enter into that very much because it treats mostly of surgical diseases of the chest.

By the Court:

Q. Is there any other book on tuberculosis?

A. Well, Osler would have——

Q. Just one second, Doctor.

A. Neither of those textbooks has much to say about tuberculosis.

Q. You see, Doctor, it is pretty unfair and you seem to have somewhat of a predisposition to do it, when you get a person with a lung disease in your sanitoriums to blame it on where they work.

A. No, sir, I don't think so.

Q. Well, I had that impression from what you said the other day.

Mr. Rudner: That was very apparent from the answer [fol. 1025] of the Doctor to one or two questions that the mere fortuitous circumstance of a man having worked at a particular occupation was conclusive to the Docotr with respect to the occupation being the cause of whatever he suffered.

The Witness: I think the case that I spoke of, I said that we couldn't find any other cause, we looked for other causes. That is the only statement I made.

Mr. Rudner: Yes, but that, sir, if your Honor please, that without special circumstance in connection with the occupation being definitely available and directly attributable, I cannot see how the conclusion is possible to say because he worked there and eliminating everything else, that is the cause; it isn't sound, it isn't scientific.

The Witness: If you recall I think the Judge asked me if I had ever seen any other cases of pulmonary abscess in such workers and that is the only case that I mentioned. I said it was the only case that I had ever seen in which we could not attribute some cause other than his occupation.

[fol. 1026] Mr. Rudner: So you hung it on the occupation because it was convenient?

Mr. Turtur: This is terribly unfair, your Honor please. He didn't hang it on anything. You know Dr. Runnels' reputation, your Honor please.

The Court: There is no jury here.

Mr. Rudner: We all have reputations.

Mr. Turtur: Yes, I know; some of your other doctors have reputations too.

The Court: Well, I don't think it is necessary to go into the tubercular question.

Mr. Rudner: I at leaset think in view of what the Doctor has testified that there can be no testimony offered as to the remote possibility of this gentleman having sustained any lung condition while being subjected to soda ash.

The Court: No, I agree.

Mr. Rudner: Does your Honor agree to that?

The Court: Yes, I want to ask the Doctor a couple of questions before the jury. Not on this question.

Mr. Turtur: Your Honor, will you allow me to make a statement too, that Dr. Runnells did state that the history was that this gentleman was subjected to this soda ash and with the soda ash came the skin irritation and also from [fol. 1027] that came the cough. That is what the history is of this man.

The Court: Dr. Runnells, I wouldn't think you would say, would you, Doctor, that it is anything more than a conjecture?

Mr. Turtur: Well, that was the history.

The Witness: Yes, I think so.

The Court: You think you would say it?

The Witness: No.

The Court: No, I didn't think you would, unless—all right, bring the jury back.

Mr. Turtur: But that was the history, your Honor.

The Court: All right. Now, is the other employee here?

Mr. Rudner: Do you want the other employee before the jury is called?

The Court: No, I want to ask the Doctor in the light of what I think is my improved medical knowledge one question. I want the jury, please.

Mr. Rudner: Do you want this other employee?

The Court: No, he can wait. He is just here in case Mr. Turtur wants to call him.

(Proceedings resumed in the presence of the jury.)

[fol. 1028] The Court: I shall tell the jury he is here; it is up to Mr. Turtur what he does with him.

John E. Runnells, recalled (in the presence of the jury):

By the Court:

Q. Dr. Runnells, since you were here the other day we have had a good deal more enlightenment, I think and part of it came from a book by Doctors Norris and Landis, and I read to the other doctors who were called by the defendant this statement from the book—this is under bronchiectasis and under the sub-classification "The exciting factors" and the subclassification "Further intrinsic air conditions acting directly through the bronchi."

"The chronic form of bronchitis is most likely to lead to bronchiectasis as long standing inflammatory process tends to weaken the bronchial wall as a result of severe attacks of coughing. The weakened wall is unable to resist the increased pressure of air and hence the bronchi dilate." Would you agree with that?

A. Yes, sir.

Q. I understood that was somewhat along the lines, as I [fols. 1029-1030] recollect, of what you had said. The other doctors for the defendant also agreed with that statement but they said this about it, that in the case of bronchiectasis, by chronic bronchitis, the dilation of the bronchioles would appear in more than one place in the bronchial area because the coughing would strain all parts of the bronchial area and that when the tissue, if that is the right word, would break down in more than one place, and they said that in a case such as this where there was only one area affected, that that must be attributable to some foreign body in that one area. Do you agree to that?

A. You are talking about bronchiectasis?

Q. Yes.

A. Bronchiectasis is the dilation of the terminal bronchi and they are multiplie in character. There is no question about that. And an abscess is an isolated breaking down of the pulmonary tissue. The two things are entirely different, in my opinion, and you can get an abscess from inhalation of septic material following an anesthesia or any condition where there is inflammation already present in the lung tissue. That is my opinion.

Q. Well, in this case there is also testimony, as I remem- [fol. 1031] ber it, I mean if I am misquoting it I want to be corrected, that this man could not have an abscess because an abscess can be located and drained off.

A. Well, he certainly has abscess and if you are talking about the disappearance of the abscess, it might disappear if it has proper drainage and it might persist and continue to excavate the whole lung before——

Q. The doctors said, the other doctors said that an abscess was something that was curable. I said for the man's own sake if he has an abscess it ought to be located and it ought to be cured, whereas they said that bronchiectasis is a disease which can only be cured, they said, by a very radical operation, if at all.

A. The cure of pulmonary abscess in most cases is drainage of the abscess in some form; if it can be drained by a bronchoscope or pustule drainage well and good, but if not he has to have an operation, that is, resection of the rib and drainage from the outside, and what should have been done with this man, I think, over a year ago.

Q. Well, they said, Doctor—there was testimony that four attempts had been made to locate any abscess and that they [fol. 1032] had failed because there wasn't any. I think that was the testimony.

Mr. Turtur: I beg your Honor's pardon, I don't think that was the testimony.

Mr. Rudner: The testimony was that the hospital records showed that.

Mr. Turtur: We have no hospital record.

The Court: Dr. McCallion had them, I think.

Mr. Turtur: Only from the hernia your Honor please.

Mr. Rudner: Dr. Pollak testified to that.

Mr. Turtur: Dr. McCallion testified to the hospital record when he was admitted as to the hernia but no other record, your Honor please.

Mr. Rudner: He was in the hospital after the operation.

Mr. Turtur: That's right.

Mr. Rudner: I understand this man was attended by Dr. Gluckman, the attending physician.

The Court: Shilling.

Mr. Turtur: Shilling.

Mr. Rudner: There was nothing produced in this case at all. I understood Dr. Schilling made these tappings and couldn't get any drainage.

[fol. 1033] Mr. Turtur: That is a very unfair statement because Dr. Schilling didn't do anything of the sort, and your Honor requested, when I wanted to bring in other treating physicians, your Honor said no, and I stopped it though I had Dr. Dwyer, and Dr. Steele and others.

The Court: Well, any doctor that tired to locate the abscess I think should be brought in. Better bring him right in. Where does he live?

Mr. Turtur: Any Doctor that what, your Honor?

The Court: Any doctor that tried to find an abscess and failed should be brought in. Your diagnosis of abscess is simply from the X-rays, isn't it, Doctor?

The Witness: Yes, and physical signs.

The Court: The other doctors all said that it was impossible to determine, either from an X-ray or from odor and that sort of thing, whether it was an abscess or whether it was the foul matter brought about by bronchiectasis.

Mr. Rudner: Or gangrene.

The Court: Or gangrenous matter. They all said that.

The Witness: I don't agree with them at all, I don't [fol. 1034] care who they were, and as a matter of fact it would be extremely difficult for them to say he had a bronchiectasis without special methods of determining it. He should have had what we call a lipoidal injection into his bronchial tree and have an X-ray taken if they wanted to show a bronchiectasis definitely.

The Court: Well, there was one of those books mentioned that.

Mr. Turtur: Nothing of that kind was done in this case.

The Court: Done by either side, was it?

Mr. Turtur: No, sir, they relied on the X-rays taken at the hospital.

The Witness: An X-ray of a bronchiectasis is much more indeterminate than an X-ray of an abscess in my opinion.

The Court: Well, you think the pictures of the two different conditions are so visible that they can be shown?

The Witness: They are entirely different, in my opinion. The X-ray determination of the two conditions, bronchiectasis and abscess.

The Court: Who took those X-ray pictures, who took them, for what purpose were they taken?

Mr. Rudner: Which, the tests?

[fol. 1035] The Court: The X-rays.

Mr. Rudner: I think the attending physician took the X-rays as far as I know.

Mr. Turtur: Well, please don't make any statements, Mr. Rudner——

Mr. Rudner: I don't know who took them. Will you tell the court?

Mr. Turtur: They were taken, your Honor please, at the Alexian Brothers Hospital and the record shows what the diagnosis was by the roentgenologist after the X-rays were taken.

The Court: Dr. Runnells says that they ought to be taken differently—don't you?

The Witness: Oh, no.

Mr. Rudner: Your Honor please, Mr. Turtur asked me to waive formal proof of the X-rays and I consented.

Mr. Turtur: Yes, I asked him that, your Honor please, because of the fact that I didn't want to pay an extra doctor just to come and say that they were the X-rays of George Matey.

Mr. Rudner: And I cheerfully consented.

Mr. Turtur: And Mr. Rudner kindly consented to that. His doctors had examined the same X-rays and they were [fol. 1036] the X-rays of George Matey. That's so, isn't it, Mr. Rudner?

Mr. Rudner: That's right.

Mr. Turtur: And that is why formal proof was not given to the court, your Honor please, as to which X-rays they were that were introduced in evidence. It was stipulated that they were the X-rays taken of George Matey during his treatment.

The Court: Now, Dr. Runnells says that we could determine definitely whether there is a bronchiectasis by a different kind of X-ray.

The Witness: Different method.

The Court: That would settle the point, wouldn't it?

The Witness: I believe so.

The Court: I think Mr. Matey's hospital hasn't treated him very well. I should think he would want to know what he has got.

By Mr. Turtur:

Q. Well, are you definite, Doctor, from your diagnosis and your physical history that this gentleman has a lung abscess?

A. Yes, I am, I feel very definitely about that.

Q. And the X-rays, Doctor, would they show whether he has a lung abscess or a bonrchiectasis definitely?

[fol. 1037] A. I think it would show very much more definitely whether he had an abscess or a bronchiectasis.

Q. And how many X-rays, Doctor, in your years of experience have you examined for pulmonary conditions?

A. Oh, I suppose five or six hundred a year, something like that, perhaps more.

Q. And how many years have you been specializing and been examining X-rays for that purpose?

A. About 18.

Q. So that it would be 18 times 500 or 600, is that so?

A. Yes, sir.

Q. And from your years of experience, Doctor, then, you definitely state that by your study of the X-ray plates he has a lung abscess?

A. That is my opinion, yes.

By the Court:

Q. Well, as I understood the other doctors, Dr. Runnells, that is a less serious condition than bronchiectasis and more curable?

A. Yes, it is. I would much rather have an abscess than a bronchiectasis.

Q. In other words, if he has a lung abscess he should be operated on at once, shouldn't he?

A. If they have waited too long—I think his operation should have taken place—well, I told him so when I saw [fol. 1038] him the first time.

Q. How long ago was that?

A. That was last September.

Mr. Turtur: And it was after that that he was confined to the hospital, your Honor please, from October, I believe, all the way into February of 1936.

The Witness: Of course, I wasn't his attending physician, I had nothing to say about it.

By the Court:

Q. You saw him at counsel's suggestion?

A. Yes, sir, I just made an examination and looked at his X-ray, he had an attending physician at the time.

Q. Who was he?

A. I don't recall.

Q. Dr. Schilling?

Mr. Turtur: Yes, your Honor.

The Court: Where is Schilling?

Mr. Turtur: Well, I wanted——

The Court: All right, where is he now?

Mr. Turtur: I suppose he is in Elizabeth.

The Court: That is not very far away. Have him here. [fol. 1039] Dr. Schilling doesn't, as I gather then, seem to have taken the advice of Dr. Runnells and he did nothing about it.

Mr. Turtur: He may possibly have, your Honor, because I didn't see the man again until a month ago.

The Court: Well, he didn't operate anyway.

The Witness: No, sir.

Mr. Turtur: Dr. Schilling is not a surgeon, your Honor.

The Court: He didn't have anybody operate on him.

The Witness: He did go to the Alexian Hospital, I believe.

Mr. Rudner: He did what?

The Witness: I think he went back to the Alexian Hospital but I don't know the subsequent course at all.

The Court: Then you cannot really answer my question with respect to whether the bronchiectasis would show in other places because you don't think he has bronchiectasis at all?

The Witness: There may be an associated bronchiectasis at the present time following such long continued suppuration of the lung, but I don't think the original condition [fol. 1040] was due to bronchiectasis.

The Court: There has been no authority produced for the proposition that a lung abscess without bronchiectasis can be caused by dust. Norris and Landis are authority for the theory that bronchiectasis can be produced by acute bronchitis which in turn is caused by dust, they say that.

The Witness: Yes.

Mr. Rudner: They say some other things about the mucous membrane too.

The Court: Yes, they say, "After subacute inflammation of the bronchial mucous membrane" and the other doctors called by the defendant agree that that might be so but said that it couldn't be so in this case because it wasn't widely spread over the lung, but there is nobody who said that lung abscess could be caused by it, I mean no other authority except your Honorable self, no reported instances of it.

The Witness: The only thing that I contend, your Honor, is that chronic inflammatory condition of the lung can produce almost any condition, you could have bronchiectasis or abscess or cancer or tuberculosis if the inflammatory [fol. 1041] condition is continued long enough and you have an etiological factor added to it like the bacillus of tuberculosis. That is all that I contend.

The Court: All right, I have no other questions.

Mr. Rudner: Have you finished, Mr. Turtur?

By Mr. Turtur:

Q. Dr. Runnells, would you say that the mucous membrane is affected when a man is subjected to inhalation of inorganic alkali dust and has a cough?

A. I should think so, yes.

Q. Now, Doctor, you have performed many operations, haven't you, Doctor?

A. Operations? No, I am not a surgeon.

Q. Oh, I see. Well, what does it indicate to you, Doctor, if anesthesia was given by nitrous oxide with ether?

A. Nitrous oxide with ether?

Q. Yes, instead of just ether alone.

The Court: Isn't that common practice nowadays, Doctor?

The Witness: I think it is, yes, sir. I know in our day's work at the institution we use practically always nitrous oxide.

The Court: Well, in other words, I don't want to do what [fol. 1042] I accused Mr. Turtur of doing the other day and testifying but my wife had an operation last year and no bad effects in any way and she had nitrous oxide and ether, Dr. Poole.

The Witness: That's all right, but in pulmonary conditions, chest conditions, we try to keep away from ether if we can.

The Court: But counsel is trying to infer that because this operation was done with nitrous oxide as well as ether, that therefore the examining physician found a lung condition and that was the reason they used it. Is that inference permissible, I mean?

The Witness: Well—

The Court: I mean in the operating room of the modern hospitals don't they always give ether and nitrous oxide? I mean in the case I gave you—I don't want to testify—I asked Dr. Poole about it, who as you know is a great surgeon, and he said they always did, that that was the normal practice.

The Witness: Well, my contact with operating rooms outside of my own institution is so small I wouldn't want to say.

[fol. 1043] Mr. Turtur: Your Honor, may I ask this question?

By Mr. Turtur:

Q. Isn't it a fact that when a lung condition is present, ether for a general anesthetic is contraindicated and nitrous oxide in conjunction with ether drip is used to obtain surgical relaxation?

The Court: You got that out of a book.

Mr. Turtur: I got that from a doctor, your Honor please. I certainly wouldn't know anything about it.

The Court: The language was a little technical.

A. I am not an expert on anesthetics but I would say that all I can say is that we try to avoid ether in operations on the chest. That's all that I know about anesthetics.

Q. And if nitrous oxide then is given in conjunction therewith what would you have to say, Doctor?

The Court: The Doctor has answered.

Mr. Rudner: He says, "We never give ether when a man has a chest condition."

Mr. Turtur: He didn't say that, Mr. Rudner; you perhaps didn't listen.

[fol. 1044] Mr. Rudner: He avoids ether.

Mr. Turtur: Please don't let's start that way again Mr. Rudner.

Mr. Rudner: You are starting it, I am not.

Mr. Turtur: I am not starting anything.

The Court: The Doctors says he cannot answer that question.

Mr. Turtur: I was wondering, your Honor, if he could give us any information as to when nitrous oxide is used in conjunction with ether, whether it wasn't so, with reference to my question——

The Witness: The combination, as I understand it, is much less irritating to the bronchial mucous membrane.

The Court: Do you want to ask any questions, Mr. Rudner?

Mr. Rudner: Yes.

By Mr. Rudner:

Q. Dr. Runnells, your examination last fall took how long?

A. Oh, possibly 20 minutes to half an hour.

Q. And that was merely for an examination, not for the purpose of attending Mr. Matey?

A. No, sir.

[fol. 1045] Q. Now, your examination last month, how long did that take?

A. Approximately the same length of time.

Q. That was under the same circumstances, for the purpose of examining the man and nothing beyond?

Mr. Turtur: I object to that, your Honor please. That was at the time when I wanted to bring Mr. Matey into court. You will remember, your Honor, wanted a report from Dr. Runnells.

Mr. Rudner: All right, I am not questioning that.

Q. And you never attended this man?

A. No, sir.

Q. Docotr, aside from the physical examination is it possible to tell from an X-ray, independent of any physical examination, what a man has, whether it is an abscess or bronchiectasis?

A. Yes, I think so.

Q. From X-ray alone?

A. Yes, sir, I think so.

Q. Isn't that something new in medical science?

A. No.

Q. Why do you make these tests of putting something into the throat, getting to the lungs, to determine what a man has with particular regard to bronchiectasis?

[fol. 1046] A. That is to fortify your opinion, if you like, make a differential diagnosis.

Q. Just merely to fortify your opinion?

A. Yes.

Q. Now, Doctor, when a man has an abscess you always try the drainage process, do you not, to evacuate whatever there may be in the abscess?

A. Yes, sir.

Q. Now, if one or more attempts are made to evacuate the contents of the lung abscess and nothing evacuates what does that suggest to you?

Mr. Turtur: I object unless Mr. Rudner now promises the court that is what he is going to prove.

The Court: I will strike it out if he doesn't.

A. I don't know by what method they attempted to drain the abscess, sir.

Q. You don't what?

A. I don't know their method of draining the abscess.

Q. I see, It would depend upon the method?

A. Yes, sir.

Q. Now, Doctor, if a man inhales an irritating ingredient, assuming dust or fumes, that enters the lungs bilaterally, does it not?

Mr. Turtur: I object to the question unless he asks the [fol. 1047] Doctor how it enters into the lungs, your Honor please.

Mr. Rudner: Now, your Honor please, a leading question to a doctor on a medical question is not a leading question and this is cross-examination now.

The Court: You may answer. All right, Doctor.

Q. Doctor, if an irritating fume or dust enters the lungs it goes to the throat and nostrils; doesn't it enter the lungs bilaterally?

A. You mean in both lungs?

Q. Yes.

A. I presume so.

Q. That would be the effect, it would enter both lungs?

Mr. Turtur: Let him finish. He said, "I presume so." I couldn't hear the rest.

A. (Continuing.) I imagine so unless there was an obstruction to the bronchi.

Q. That's right, unless there is an obstruction on one side, if a man inhales irritating fumes or dust it enters both sides of the lungs?

A. Yes.

Q. And does it enter——

A. Supposedly; I presume so.

[fol. 1048] Q. And does it enter both sides in equal portions?

A. I cannot tell that.

Q. You don't know?

A. No.

Q. And when the irritating fumes or dust are so inhaled and enter the lungs both sides, isn't the fact that the irritating effects are disclosed on both sides of the lungs?

A. I should think so, yes.

Q. So that if there is no obstruction on one side of a lung and if a man inhales irritating fumes or dusts and it goes into both sides of the lungs, the irritating effects would be evidenced on both sides of the lungs?

A. I presume so.

Q. And in that case if there was a situation and there was an irritating effect on both sides of the lungs, that would appear in the X-rays?

A. If it reached a certain stage it might.

Q. Yes, I mean after a period of time, over a period of time, if there was inhalation of the irritating fumes or dust the X-ray would show effects of the irritating inhalation on both sides of the lungs?

A. Well, possibly yes, that is possible.

[fol. 1049] Q. And how would that appear on the X-rays, what would you see on the X-rays?

A. If the inflammation was sufficient you would probably get an equal difficulty in the penetration of the light on both sides, that's all.

Q. Get what?

A. Just a lack of penetration on both sides equally.

Q. And might not that develop into fibrosis on both sides?

A. It could, yes.

Q. And there would be evidenced from the X-rays themselves signs of the infiltration of this irritating substance, whatever it may be, on both sides?

A. If it was continuned long enough.

Q. Yes, I am assuming it was continued; is that correct?

A. Yes.

Q. All right. Then the fact—suppose an X-ray shows a side of a man's chest being entirely clear, does that suggest to you that it was free from an obstruction?

Mr. Turtur: I object to the question. I think the Doctor ought to be asked what that suggest- to him.

The Court: Put it in that form.

[fol. 1050] Mr. Rudner: I beg pardon?

The Court: I say put it in that form.

Q. All right——

Mr. Rudner: If your Honor please, when I ask these questions of a doctor it suggests nothing.

The Court: I think it is silly myself.

Mr. Turtur: Well, I withdraw it, your Honor, if you think so.

A. Yes, obstruction of the bronchus.

Q. Yes. I mean that, so that assuming that the right side of a man's chest or the left side as reflected by an X-ray shows that it is entirely clear, it is your opinion that there was no obstruction in the bronchi, is that it?

A. Yes.

Q. Into the chest?

Mr. Turtur: When?

Q. That is correct?

A. Into the lungs.

Mr. Turtur: When?

Q. At the time the X-ray was taken.

Mr. Turtur: You mean before the operation or after or when the X-rays were taken?

Q. At the time the X-rays were taken, that is what I am [fol. 1051] talking about; is that correct?

A. Yes.

Q. If those facts be the case, Mr. Matey's right side, is it or left side is clear,—right side or left side?

Mr. Turtur: The left is clear.

A. You have got me now.

Q. The left side is clear?

A. That's right.

Q. As to all X-rays. That establishes that lung or the parts leading to the lung contained no obstructions?

Mr. Turtur: Which lung?

Q. Is that correct?

Mr. Turtur: Which lung, Mr. Rudner, which contains no obstruction?

A. Obstruction to the lung, bronchus, produces complete obliteration what we call ectasia.

Q. What is that?

A. An obstruction to the bronchus is a serious affair.

Q. Yes, I understand that. Now we are dealing with Mr. Matey's X-rays which show that on the left side it is entirely clear with no obstruction, it was entirely clear at least. That would suggest to you from the X-rays that there was no obstruction on the left side of the lung?

[fol. 1052] A. Why, of course there was no obstruction.

Q. Yes, that's right.

A. You cannot get an obstruction to the bronchus unless you swallowed some article or had cancer around the bronchus or something of that kind.

Q. All right. Now Doctor, since we find no obstruction on the left side of Mr. Matey's lung, your X-rays being entirely clear as to that side, and since, as you say, if an individual inhales these irritating dusts or fumes over a period of time, evidences of the irritation, the infiltration of the irr-tating substance appear- in the lung, how do you account for the absence of any evidences of an irritation in the X-rays of Mr. Matey?

A. May I have that question? I don't get you at all. I don't know what you are driving at. I only saw the X-ray at the time.

Q. H'm?

A. I only saw the X-ray last fall; that showed an abscess on one side of the lung.

Q. I will set these forth, Doctor, in the order in which they were taken. This is the order in which they were taken, Doctor——

Mr. Turtur: Will getting near the window help you any, Doctor?

[fol. 1053] The Witness: No, this is all right.

A. There is the abscess there in that one.

Q. Take this X-ray dated 7/6/34; you find what?

A. Find this evidence of acute inflammatory process in the lower lobe of the right lung.

Q. How about the left lung?

A. On this side there is evidence of fibrosis and old chronic inflammatory condition.

Q. Where do you find that?

A. All through this.

Mr. Turtur: Referring to the left lung?

The Witness: Yes, I am.

Q. When did you see those X-rays before, Doctor?

A. I saw this one at the time I examined the patient.

Mr. Rudner: Your Honor, yesterday the definite suggestion was made there was no fibrosis appearing on those X-rays from any of the physicians, plaintiff's or defendant's.

Mr. Turtur: They were all his witnesses, your Honor please.

The Court: Does Dr. Runnells say there is?

The Witness: I think there is some slight fibrosis there, yes; there is bound to be in any man's chest of his age or mine or yours.

Q. What is that?

[fol. 1054] A. There is bound to be some in every case.

Q. You say we all have fibrosis?

A. Yes.

Q. Then all you find is the natural fibrosis which we all have?

A. And fibrosis is a result of a chronic inflammation.

Q. Now, we all have fibrosis of the lungs, do we not?

A. Somewhat.

Q. Over 90 percent of us?

A. Yes.

Q. What is that due to?

A. I think it is due to the inhalation of foul air and dust in our occupation and living and everything, all of the circumstances of life that we come in contact with.

Q. So that I as a lawyer would have fibrosis?

A. You are just as apt to as anybody.

Q. And you as a physician have fibrosis in your chest?

A. Yes.

The Court: Lawyers get it from talking too much.

Q. But where do you draw the distinction, Doctor between the fibrosis which I or you may have and the fibrosis reflected in that first X-ray?

[fol. 1055] A. The only distinction is that in a great majority of instances it doesn't make any difference whether you have fibrosis or not.

Q. I see. So in case of the X-ray which you examined, that is of no consequence there?

A. I don't think so, no.

The Court: That's all Doctor.

By Mr. Turtur:

Q. Did you say, Doctor——

Mr. Rudner: Just a moment, I haven't finished.

Mr. Turtur: Oh, you haven't finished. We are going beyond the scope the Doctor was called for. He is putting him through another general cross-examination.

The Court: I don't think you should go all over it again, Mr. Rudner.

Mr. Rudner: I thought because plaintiff's attorney went into it you wanted me to cross-examine.

The Court: I think we have had enough from both sides.

By Mr. Rudner:

Q. Just let me ask another couple of short questions; Doctor, on October 23, 1933, Mr. Matey was put through a physical examination from head to foot lasting between 40 [fol. 1056] minutes and an hour where there were no rales present in the lungs and a chest expansion of 3 inches was found—that is October 23, 1933. On June 14, 1934, he was examined by the resident physician of the Alexian Brothers Hospital in Elizabeth in preparation for a hernia operation and no rales were found to be present and no evidences of any chest involvement was found. He was then operated on for hernia, given this nitrous oxide and ether, and he had a normal convalescence at the hospital and was there for seventeen days. What did that suggest to you?

Mr. Turtur: Well, I object to the question, your Honor, because Dr. Runnells already answered the question about rales.

The Court: I thought he did.

Mr. Turtur: He said the mere absence of rales doesn't make any difference, if your Honor recalls, when he might have been in a quiescent stage or even a cough, if it wasn't there, might have been in a quiescent stage. So he answered that on your last cross-examination.

Mr. Rudner: I have forgotten about it.

Mr. Turtur: And besides he is giving him a hypothesis.

[fol. 1057] The Court: Let him answer.

Mr. Turtur: All right.

A. Well, absence of rales doesn't mean——

Q. What's that?

A. Absence of rales doesn't mean absence of disease.

Q. I see. What does 3 inches——

Mr. Turtur: Let him finish, Mr. Rudner.

Q. Have you finished, Doctor?

A. That is enough.

Mr. Rudner: No, he says he is finished, Mr. Turtur.

Q. Have you finished, Doctor?

Mr. Turtur: Well, you keep interrupting him, you see.

Mr. Rudner: He says he is finished with the answer. Please address the court and not me.

Q. Now, Dr. Runnells, what does a three inch chest expansion suggest to you?

Mr. Turtur: I object to this, your Honor.

A. That he had a good chest expansion, that's all.

Q. What's that?

A. That he had a good chest expansion.

Q. What does that indicate with respect to the condition of the lungs?

A. Fairly good.

[fol. 1058] Q. A what?

A. A fairly good condition; chest expansion doesn't mean anything.

Q. I mean a chest expansion of three inches is pretty good?

A. Yes.

Q. Normal?

A. I have seen it in tubercul*osi,* I have seen it in lots of conditions; I don't think it means very much.

Q. Doctor, could one inhale an irritating sus*b*tance without affecting his nostrils, the membrane of the nostrils and the inside of the mouth?

A. Could they?

Q. Yes.

A. I don't think so, no.

Q. So that if a person inhales an irritating substance which were to affect the lungs, it must necessarily have affected the nostrils, the eyes perhaps and the organs of the nostrils and the mouth leading to the lungs?

A. I would expect it to, yes.

Q. That's all, Doctor. Thank you.

Redirect examination.

By Dr. Turtur:

Q. What does it indicate to you, Doctor, that he had this cough when exposed to the inhalation of these inorganic substances?

[fol. 1059] A. Well, he might have had, must have had an irritation of his bronchial mucous membrane; the only thing that will produce a cough is an infection or an irritation of some kind.

Q. And so that we get it clear, an irritation to the skin you say is also an irr-tation to the lung if he inhales that substance?

A. I believe so.

Q. The right lung, is it not the favorite side of all kinds of foreign bodies?

A. Yes, I believe that is so.

Q. Well, the mere fact then that this man has some fibrosis in the left lung and has this abscess in the right lung, does that indicate anything to you?

A. Nothing special, no.

The Court: That's all Doctor. Than- you.

By Mr. Turtur:

Q. A condition in the right lung, Doctor—pardon me, I will reframe it——

The Court: I am trying to get you away, Doctor.

Q. Fibrosis, you said, Doctor, is a result of chronic inflammation?

A. Yes.

Q. And it may be so more in one man that is exposed to [fol. 1060] the inhalation of inorganic substances than to Mr. Rudner or to me or to anyone else in this court room, isn't that so, who is not exposed to it?

A. Presumably, yes.

Q. So the mere fact that the questions were asked of you with reference to the left lung does that change your opinion, sir, as to what you stated the other day in any way as to the condition that this man is suffering from?

A. No, I don't think it does.

Q. And does it change your opinion in any way, the reason for his suffering from this condition?

A. No.

Q. That is all.

By Mr. Rudner:

Q. Doctor, since that question has been gone into, may I have the opportunity of a little more cross-examination on that phase? Since the abscess, as you say, is on the left lung——

Mr. Turtur: Right lung.

Q. —right lung,—excuse me—and the X-ray which you saw shows only the natural condition of fibrosis on the left side, doesn't that indicate to you that whatever this man had couldn't come about from the inhalation of irritating dusts or fumes?

[fol. 1061] A. No, I don't think that necessarily. A focus of infection can, or infection can focus anywhere. You have an infection of your skin, you might get a boil somewhere but you don't get them all over.

Q. Yes, but you did say that a person inhales irritating fumes and dusts equally and it goes into both sides of the lungs and it would leave results on both sides of the lungs. Now, we say that on the left side of this man's lung there is nothing beyond the natural fibrosis, whereas on the right side you have this abscess, as you say; doesn't that suggest that whatever this man had couldn't have come about because of the inhalation of irritating dust and fumes?

A. It just indicates to me that that is where the abscess pointed, where the focus struck. We don't get tuberculosis all over the lungs, we get tuberculosis in the apex or the base.

Q. Well, in tuberculosis that is a specific germ disease, is it not?

A. Yes, but it is the same organ.

Q. You said, Doctor, that a cough suggests an inflammation in the bronchial mucous membrane.

A. Yes.

Q. But does it suggest irritation of the nostrils, eyes or mouth?

A. You would be very apt to get sneezing or irritation [fol. 1062] of the nose.

Q. Let's leave out the sneezing. Let's deal with the cough only.

A. You couldn't get a cough unless it got down to your larynx.

Q. What is that?

A. You wouldn't get a cough unless it got down to your larynx.

Q. So that the fact that a man coughed wouldn't suggest to you that he had any inflammation of the nostrils or the back of the throat or the part leading from the nostrils or the mouth to the lungs?

Mr. Turtur: Well, I suppose Mr. Rudner is going to prove that, your Honor please.

Mr. Rudner: What is that?

Mr. Turtur: You told me to address the court, that is what I am doing.

A. I should think they would be in conjunction, if you had inflammation at one place you would in another at the same time.

Q. Well, now, please, Doctor, we are not thinking—we are dealing with facts here.

Mr. Turtur: Well, that is what the Doctor is telling you—just one moment, he is trying to give an honest opinion, your Honor.

[fol. 1063] Mr. Rudner: Your Honor please, may I ask the witness this question?

Q. You stated that the fact that a man coughed would suggest that he had an inflammation in the bronchial tubes, is that it?

A. Bronchial tubes.

Q. All right. You don't go beyond that, do you, with respect to the possible cause of the cough?

Mr. Turtur: He has answered that. I object to it, your Honor please. He has answered that several times.

The Court: Go ahead.

Mr. Turtur: This case will go on for three more weeks if he continues that way.

The Court: I think he has answered it.

Mr. Turtur: So many times.

The Court: Well, let him answer it once more then.

(Question repeated by the reporter.)

A. No, I don't.

Q. That is all.

By Mr. Turtur:

Q. That also means the mucous membrane, doesn't it Doctor?

A. The entire bronchial tree from your nose to your [fol. 1064] diaphragm is covered with mucous membrane.

Q. That is all.

The Court: All right, go ahead, Mr. Rudner.

Mr. Turtur: Does your Honor want a conference at the side bar?

The Court: Not particularly.

GEORGE SITCH, called and sworn on behalf of defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mr. Sitch, where do you live?

A. Linden.

Q. And you work for the Grasselli Chemical Company?

A. I do.

Q. How long?

A. Six years.

Q. When did you start?

A. September, 1929.

Q. And what department have you worked?

A. Silicate.

Q. Have you always worked in the silicate department?

A. For those six years I did.

Q. Still working there?

[fol. 1065] A. I am.

Q. Did you know George Matey when he worked there?

A. Yes.

Q. What work have you done in the silicate department?

A. What work I done in the silicate department?

Q. Yes.

A. I worked the furnace the same as George did.

Q. What else?

A. Oil shift leader now.

Q. A little louder, please.

A. I work at the furnace and I have work oiling and I work all the place there is in there in the silicate department.

Q. Did you work in all the rooms in the silicate department?

A. All the rooms in the silicate department.

Q. Did you work in the mixing room?

A. I worked in the mixing room too.

Q. Metasilicate?

A. Metasilicate.

Q. Furnace room?

A. Furnace room.

Q. Did you work there the same time that George Matey did?

[fol. 1066] A. I did.

Q. And he came there before you did?

A. About a year before me.

Q. And how often would you see him, would you work in the same shift?

A. About every three weeks.

Q. About every three weeks in the same shift, then you worked other shifts. Did you know what George Matey did there?

A. He was a furnace man.

Q. What would you say with respect to the dust conditions in the silicate department while George Matey worked there?

Mr. Turtur: Only as to when he worked with him, your Honor please.

Q. While you worked there and he worked.

Mr. Turtur: I know but he only used to work with him at a shift every three weeks.

Q. Only while you worked there and he worked at the same time.

A. Well, where George worked there was a little dust in front of the furnace say where the feeders were and back in the glass bin there was a little dust; the only time, when he would dump a buggy, he would dump a buggy in the bin and he would get away from it.

[fol. 1067] Mr. Turtur: Please talk a little louder, I don't hear it.

Q. Speak up.

A. There was a little dust where he dumped the buggy in the bin. As soon as he dumped that buggy he would get away from it.

Q. What was that operation of dumping the buggy?

A. That was the furnace that was in his job.

Q. That was the finished glass?

A. That was the finished product.

Q. Where do you dump the buggy?

A. In the glass bin, this side of the furnace.

Q. How far from the furnace?

A. Well, say about 100 feet.

Q. What would he do when he dumped the buggy?

A. Dump the buggy in the bin, he dumped the buggy lifted it up and put it back into place again.

Q. Did you see him when he worked near the furnace on the platform?

A. I did.

Q. What did you see about dust there?

A. Well, I would say when he was working around the furnace there would be no dust at all, only a little dust in front of the furnace at the feeders.

Q. Did you ever see while George Matey worked there, [fol. 1068] did you ever see dust pouring from the conveyors down on him, pouring like rain?

A. Dust couldn't pour from the conveyors. There is no conveyor except up on the top. That is all closed in. I don't see how the dust could come out.

Q. Did you ever see any dust come from the top?

A. Not from the top conveyor, I did not.

Q. Now, did you ever see dust in the silicate room that was thick like smoke, heavy smoke?

A. I wouldn't say I seen as thick as smoke, I seen a little dust; I wouldn't say it was heavy.

Q. Was that during the whole time you and George worked there?

A. Yes.

Q. Did you ever talk to George Matey while he worked dow- in the plant the silicate department?

A. I did.

Q. Did you ever see him cough?

A. No, I never heard him cough in there.

Q. You speak Slavish?

A. I do.

Q. And George Matey spoke Slavish?

A. He does.

Q. How did you speak, in English or Slavish?

A. I spoke to him in Slavish.

[fol. 1069] Q. Did George Matey ever tell you he had a bad cough while he worked in the silicate department?

A. He did not.

Q. That is all.

Cross-examination

By Mr. Turtur:

Q. Where did the dust come from?

A. Well, the dust where George worked at the furnace would come——

Q. In the department?

A. —in the department.

Q. Yes.

A. Well, there is dust all over the department, a little dust.

Q. Sure. No respirators are ever given to you, are they?

A. What for? We don't need them.

Q. No. And was George in good health when he came to work there?

A. I don't know whether he was or not.

Q. Was he in good health while he worked there?

A. He was, that I know.

Q. All the time?

A. I didn't see anything wrong with him, only he had that carbuncle on his neck.

Q. And then from then on he got worse and worse, isn't [fol. 1070] that so?

A. I wouldn't say.

Q. Whey won't you say it?

A. Well, how should I know?

Q. Well, don't you know?

A. No, I don't.

Q. Well, then, you don't know, as a matter of fact, whether he had any cough or not, do you?

A. I do, he didn't have no cough.

Q. He did not?

A. Not when I saw him or when I talked to him.

Q. I see. And that was once every three weeks when you worked on the same shift?

A. That wasn't once every three weeks, that was a week every third week I worked with him for that whole week.

Q. Right alongside of him?

A. Not right alongside of him, I was with him three or four times a day, I was by him.

Q. You are still working with the Grasselli Chemical Company?

A. I am.

Q. And does it make any difference the way you are testifying here because you are still working for the Grasselli Chemical Company?

A. What difference should it make?

[fol. 1071] Q. Makes no difference to you?

A. It don't.

Q. And you said there was dust all over; where did this dust come from in the department?

A. Where did the dust come from in the department?

Q. Yes.

A. Dust, it could be from——

Q. Where did it come from?

Mr. Rudner: He is telling you.

The Witness: I am telling you.

Q. Not what it could be from, where did it come from?

A. If you are working the mixing room there is dust there.

Q. Sure.

A. Little dust.

Q. What kind of dust is that?

A. Soda ash dust.

Q. Yes, there is dust in the mixing room, soda ash dust; where else?

A. Well, might be a little dust in the department.

Q. Where?

A. In the department.

Q. While working——

A. You go into a department there now, there isn't any [fol. 1072] dust, there wasn't when George was working. If you walk through the mixing room you would see a little dust while a man is doing his operation; there might be a little at the furnace or at the metasilicate department. There will be a little dust there but you won't find so much; you cannot work in it.

Q. Was there any dust around the furnaces?

A. Little bit.

Q. How many times did it ever puff back while George was working there in your presence?

A. Well, I would say I have seen it while George was working there.

Q. Yes. And how often would that puff come?

A. Well, it might happen say in one day or it might happen six or seven times, then it won't happen for a month or two months.

Q. And it may happen the next day six or seven times, isn't that so?

A. Yes, and may not happen for the next four or five months.

Q. Four or five months?

A. Yes.

Q. Do they have anything in the openings to where this soda ash is fed into the furnaces?

A. What do you mean?

[fol. 1073] Mr. Turtur: May I have those photographs? Are these all of them that were introduced?

Mr. Rudner: Yes.

Q. Right here at the mouth?

A. Yes, that is the slide, that is the hopper, that is where your mix comes into your feeders.

Q. And whereabouts, right there into this feeder or what is this, the hopper?

A. Yes, that is the hopper.

Q. And where from that hopper does that puffing come from?

A. It comes in out of these sides, a little bit from this side here.

Q. Now, will you draw a line there and put your initials there, please.

A. You see this? That there is the slide that closes that hopper when they want to pull these feeders out, that slide there, this is where the dust comes down.

Q. Now put your initial there, please.

(Witness does as requested.)

Q. Now, will you look here, please, right immediately under where this slide is and tell us what that is in that picture.

A. This here?

Q. Yes.

[fol. 1074] A. Right around this feeder?

Q. No, not the feeder, right here, sir, see?

A. Yes.

Q. Right around here. Will you tell us what that is?

A. In there?
Q. Yes.
A. That is a little soda ash dust right there.
Q. A little soda ash dust?
A. Yes.
Q. That's all, Mr. Sitch.

Redirect examination.

By Mr. Rudner:

Q. Just one question, Mr. Sitch. Did you ever see dust on the platform up to somebody's knees?
A. Never did.
Q. Did you ever see it fall down in buckets that you had to take a wheelbarrow and wheel it away?
A. No.

Recross-examination.

By Mr. Turtur.

Q. Is that conveyor up above all air tight?
A. I wouldn't say all air tight.
Q. No, there are some holes up there, aren't there?
A. There is a door on one side and there is a door on the other.
[fol. 1075] Q. Are there any holes or openings?
A. No, I didn't see any openings except the ventilators over the top outside.
Q. I am talking about this chute, sir.
A. Which chute is that, you mean in that conveyor upstairs?
Q. Yes.
A. No.
Q. No openings at all?
A. No, except the door on one side and the door on the other side and ventilation up above.
Q. All right. That's all, Mr. Sitch.

[fol. 1076] **Andrew Reneta,** called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Mr. Turtur: Your Honor please, if we want to save time, I will be happy to stipulate——

Mr. Rudner: Different department.

Mr. Turtur: I will be happy to stipulate that this gentleman if asked questions would testify to the same thing——

The Court: No.

Mr. Turtur: —that the previous witness—No, all right.

Q. Mr. Reneta, you work for the Grasselli Chemical Company?

A. Yes, sir.

Q. How long?

A. Ten years.

Q. What department?

A. Phosphate.

Q. What is your present duty in the phosphate department?

A. Shift leader.

Q. What does that mean?

A. That means I am head over eight hour shift and supervision.

[fol. 1077] Q. You have charge of men in that particular shift?

A. Yes, sir.

Q. While George Matey was working in the phosphate department, you worked there with him?

A. Every three weeks.

Q. You mean you worked in the same shift with him every third week?

A Yes, sir.

Q. So that two weeks you didn't work with him at all?

A. That's right.

Q. Every third week you worked with him at the same time?

A. Yes.

Q. While George Matey worked in the phosphate department, what did he do?

A. Dumping rock four days a week, and one day he was breaking shift.

The Court: We have had all that.

Q. Did George Matey ever work with soda ash in the phosphate department?

A. No, sir.

Q. You don't have any metasilicate in the phosphate department.

A. No, sir, we don't produce that.

[fol. 1078] Q. Did he ever work with phosphate of soda?

A. Well, the only time he worked with phosphate of soda is re-packing on the shipping side, that was in the Q building.

Q. How often would that be?

A. That is only when the department was shut down.

Q. Would that be very often?

A. No, once in two months or so.

Q. What would you say about the dust conditions in connection with soda ash and phosphate department as to where George Matey worked?

A. Well, George Matey didn't work on the side where the soda ash was.

Q. Didn't work near the soda ash at all?

A. No. The nearest platform to the soda ash is about 50 feet away from where the soda ash is consumed.

Q. That is near the vats, is it?

A. Yes, near the soda mixers, about 50 feet away.

Q. Did George Matey ever complain to you about coughs?

A. No.

Q. Did you ever see him cough?

A. No, I didn't.

Q. About ten days ago, Mr. Renta, the gentlemen of the jury and I were out to the plant inspecting the phosphate department. Did you see us there?

[fol. 1079] A. Yes, I did.

Q. Was that part of the phosphat- department which deals with soda ash in operation?

A. Yes, that was in operation, yes.

Cross-examination.

By Mr. Turtur:

Q. Mr. Matey worked 50 feet away from where the soda ash was used in the phosphate department; that is so?

A. That is right. This platform is about 50 feet from where it was consumed.

Q. Is there any white dust in that soda ash department which is 50 feet away from where Mr. Matey worked?

A. Well, there might be a little bit.

Q. A little bit?

A. Yes.

Q. You are still working for the Grasselli, aren't you?

A. Yes, sir.

Q. And you worked with him once every three weeks?

A. Yes, every third week.

Q. That is all.

Harold G. High, called and sworn on behalf of the defendant, testified as follows;

[fol. 1080] Direct examination.

By Mr. Rudner:

Q. Mr. High, tell us where you live and what you do for the Grasselli Chemical Company, when you got there, and certain facts——

A. I live in Plainfield, New Jersey. I started to work for the Grasselli Chemical Company in 1920 as service supervisor, which work included all personnel activities, including employment, safety, santiation, investigation of all unusual events, following up personal injuries wherever they happen-d on the plant, or outside of the plant, that last item for the last six years only. Since we have had an accident and health insurance coverage on all employes.

Q. Of what college are you a graduate?

A. Brown University.

Q. What degree?

A. A.B.

Q. What last did you have?

A. Master of Arts from Columbia University.

Mr. Turtur: What has this got to do with it, your Honor please?

The Court: I cannot predict what the testimony is going to be.

Mr. Turtur: We will admit he is a college man.

Mr. Rudner: I am going to qualify Mr. High as an expert [fol. 1081] in connection with sanitation and ventilation before I get through.

Mr. Turtur: Oh, I see.

Q. Prior to going to the Grasselli Chemical Company where were you employed?

A. By the Winchester Repeating Arms Company, New Haven, three years.

Q. What capacity?

A. Assistant superintendent of personnel.

Q. Did you have charge of anything else there?

A. In ther personnel department we had a man or a staff that specially devoted their time to safety and *ans*itation. That staff reported to me.

Q. Tell us what your experience has been with respect to safety, sanitation, ventilation, and so forth.

A. Ever since I have been connected with this class of work I have tried to inform myself on matters of this nature. I have attended conferences, national safety congresses, other con*v*erences of the same type. I have read literature such as I could get hold of. I have had personal conferences with such authorities as Dr. C. A. Winslow of Yale, and Dr. Leon Greenberg. I have listened to addresses by Dr. Yendel Henderson.

Mr. Turtur: Your Honor, we are not interested in whom he had conferences with. If he is going to qualify him as [fol. 1082] an expert, let him ask questions along that line.

The Court: What is your M.A. in?

The Witness: Sociology.

The Court: Do you really know anything about ventilation?

The Witness: From these various conferences I have had, when ventilation and factory safety has been the primary purpose of the conference.

The Court: I don't think he is qualified.

Mr. Turtur: Sir?

The Court: I don't think he is qualified.

Q. Have those matters dealt with ventilation?

Mr. Turtur: Mr. Runder——

Mr. Rudner: I heard what the Judge said. I am trying to lead up to it.

Q. Have your studies dealt with ventilation?

A. Frequently, yes.

Q. Have you given any lectures on sanitary ventilation matters of that kind?

Mr. Turtur: I object.

A. A number of them

Q. What have they been?

Mr. Turtur: I object, your Honor please. He has answered the court that the only information he has is as a result of conferences.

[fol. 1083] Mr. Rudner: Your Honor please, how does one study except from books and conferences with men? How did I get law except from reading it and studying it?

Mr. Turtur: Well, your Honor please, actual experience is the thing that counts, and he has told the court the only information he has is——

The Court: I don't think he is qualified unless he has a degree in sanitary engineering. I mean it is just worthless testimony, Mr. Rudner.

Mr. Rudner: Your Honor please, the test of an expert is, does this particular man know more——

The Court: Go on, insist, if you want to.

Mr. Rudner: I don't want to waste time. I think this man is qualified. If your Honor will give me a couple of more minutes I will show it.

The Court: How useless. Of course he thinks his own plant is sanitary and properly ventilated.

Mr. Rudner: Well, that is something.

A Juror: Your Honor, may I just ask a question?

The Court: Certainly.

The Juror: I have devoted two weeks here. I have been a very busy business man. It has cost me a great deal of money to do this. I am willing to do it as a citizen, but when [fol. 1084] a judge declares that a man is not competent as a witness, I don't see why we should continue to hear innumerable questions asked, four or five or six questions in the same manner.

Mr. Rudner: We will be out today.

The Juror: I think when one question is asked and the answer given, it should not be necessary to ask it so many times.

The Court: I have thought of that for eleven years.

Mr. Rudner: That is one of the weaknesses of us lawyers, just forgive us.

The Juror: You may be more patient than us, your Honor.

The Court: No, I am not, you can see I am not.

Mr. Rudner: We will be out today, Mr. Juror.

Q. Now, Mr. High you are in charge of personnel?

A. Yes.

Q. And have been during the whole time that Mr. Matey was there?

A. Yes.

Q. Did you see George Matey more or less often?

A. I hired him and I saw him very frequently after June 19th—I think it was 1932 when he was on sick leave with a carbuncle.

[fol. 1085] Q. That was in 1932?

A. Yes.

Q. And he was out for a time with a carbuncle?

A. Yes.

Q. Then what else did he have while he was with the silicate department?

A. He had some sort of an itch, for which he was treated at the hospital for some time, and later——

Q. Where was that itch? Did you see George Matey?

A. I did.

Q. And did you see where he complained of the itch?

A. I did.

Q. Where was that?

A. Under the arms and around the groin.

Q. And did you send him to Dr. Oleynick?

A. I suggested to our plant physician he should be sent there.

Q. And what else did you have to do with him in connection with these complaints?

A. I had very frequent conferences with him in connection with compensation or insurance payments, and regarding his future with the company.

Q. And while he worked in the silicate department did he ever complain about any cough?

A. Never.

Q. Did you ever see him cough?

[fol. 1086] A. Never.

Q. Did he ever complain to you about any pain in the right side of the chest?

A. Never.

Q. Or any part of the chest, front or rear?

A. No, no complaint except the itch.

Q. He was later assigned to the phosphate department?

A. Yes.

Q. Did you see him more or less often?

A. Yes.

Q. In what connection?

A. He was still under treatment at the plant hospital. He was on leave of absence on two or three occasions. I don't remember just how many, and I saw him always in connection with those.

Q. And what was that? In connection with what?

A. With those leaves of absence.

Q. What were those leaves of absence about?

A. Because Dr. Oleynick had suggested we try keeping him off the plant and see if his itch would heal up.

Q. Now during the time that you saw him, where was this itch, while he worked in the phosphate department?

A. I think on two occasions I saw him stripped at the hospital, or partly stripped at the hospital, and then I saw that it was under the arms and around the groin. Other [fol. 1087] times he said it was the same place I didn't see it.

Q. While he worked in the phosphate department, did he ever complain to you about any cough?

A. Never complained about a cough at any time.

Q. Did you ever see him cough?

A. Not while he worked for us, no.

Q. Did you, while George Matey worked in the silicate department as furnace man, or afterwards, did you occasionally go into the silicate room?

A. Frequently.

Q. How often would that be?

A. Oh, it might be as often as once a day. It might be twice a week; sometimes might be once in two weeks.

Q. Did you see George Matey working under actual working, operating conditions?

A. Very frequently.

Q. What did you observe with respect to dust in that department?

A. Very, very favorable dust conditions; that is to say, there might be a little dust in certain places, but there was never dust enough to cause any inconvenience.

Q. Were you ever in the furnace room while there was a puffing or discharging from the end of the furnace?

A. I never happened to see that until the day that I was some distance away while the jury was there.

[fol. 1088] Q. Had you ever seen it before?

A. Never happened to see it before.

Q. What would you say with respect to the dust conditions in the mix room while Mr. Matey worked there.

A. Dust conditions in the mix room at certain operations would not be pleasant if a man were in there, but we have definitely arranged that no man is in there while the mixer is being dumped. Other times the conditions of dust there are very favorable.

Q. Did you ever see George Matey work in the mix room?

A. Never.

Q. How about the metasilicate room, did you ever go in that room?

A. Yes.

Q. What would you see with respect to dust in the metasilicate room?

A. Also the very minimum of dust.

Q. Mr. High, you were in direct charge of George Matey as personnel man in connection with itch and otherwise?

A. Yes.

Q. When did you first hear that Mr. Matey was making a complaint of his lung condition being attributable to this plant?

[fol. 1089] A. When I received a letter from——

Mr. Turtur: I object to that, your Honor please. We are going into something which is entirely extraneous to this source.

The Court: Just give us the time.

Mr. Turtur: I object to it.

The Court: You may answer.

A. I think it was in the Fall of 1935.

Q. The fall or the summer?

A. I cannot be exact whether it was Fall or Summer of 1935.

Q. That was the first time that you had ever heard Mr. Matey was making a complaint that his chest condition was attributable to working conditions in the plant?

A. Yes.

Q. Prior to that time, had he or anybody else, made a complaint to you in that respect?

A. None.

Q. When did Mr. Matey finally leave the plant?

A. October 23, 1933, was the last day he was on the plant as an employe.

Q. In connection with your work as personnel man, and these other connections that you have, have you ever heard of any man in the silicate department or phosphate department suffering a lung injury or other injury to the respiratory system working in connection with phosphate [fol. 1090] of soda, soda ash, or metasilicate?

A. Never a case.

Mr. Turtur: Your Honor please, now we are opening up the same door as yesterday.

The Court: He has answered.

Mr. Turtur: What was your answer, Mr. High?

The Witness: Never a case.

Mr. Turtur: Never.

Q. Have you had occasion at times, as far as your knowledge is, that men suffered from any skin irritation?

A. Yes.

Q. What were they? Just tell us what they have been.

A. I have all injury reports of any kind that are treated at the hospital pass over my desk, and I follow them up when I think they require it. I have occasionally inquired from the Doctor as to irritations.

Mr. Turtur: I object to this, Your Honor please.

Q. Not what you heard, what you saw.

A. I followed some of them personally and looked at them with the Doctor.

Mr. Turtur: I hope he is not now trying to qualify as a physician.

Mr. Rudner: No, no, not as a physician.

Mr. Turtur: He has looked at them with the doctor. [fol. 1091] I was just wondering how far it was going.

Q. Where would this irritation be that you did see?

A. Usually on the hands, almost always on the hands.

Q. What part of the hands?

A. Fingers, or sometimes around the wrist where the clothing would irritate.

Q. You mean around the sleeves?

A. Yes.

Q. Any time on the face?

A. I don't recall a case. I wouldn't say there hadn't been one that I had seen, but I don't recall any.

Q. That is all.

Cross-examination.

By Mr. Turtur:

Q. You don't recall of any case other than irritation of the skin of the hands?

A. No.

Q. Is that because your memory doesn't serve you?

A. I think my memory is fairly good.

Q. Well, why don't you recall any? Were there any?

A. I cannot recall any.

Q. You are the personnel man?

A. I am.

Q. You follow up these cases?

A. I do.

[fol. 1092] Q. You have charge of them?

A. I have.

Q. And you cannot recall?

A. I cannot.

Q. You have been in court for how many days?

A. Twelve or fourteen, something like that.

Mr. Rudner: It seems much longer.

A. (Continuing.) It seems much longer.

Q. And you have followed this case from its inception?

A. I have.

Q. And you know what has been brought out in this trial, don't you?

A. I know certain allegations have been made.

Q. Yes, and in spite of that you cannot recall of any cases that have been treated other than on the hands from skin irritations?

A. No, I cannot. I still stand by my statement.

Q. That you cannot?

A. I cannot.

Q. You don't remember?

A. I don't recall any.

Q. How many such cases have been treated within the last four or five years, irritation of the skin?

A. My answer would be purely a conjecture from memory, probably anywhere from a dozen to twenty.

[fol. 1093] Q. Only conjecture?

A. That's all.

Q. And you follow it?

A. Yes.

Q. How about from 1920 to 1925?

A. I really don't know; I couldn't segregate it in time in that way.

Q. Could not. You were still at the head of that department then?

A. I was.

Q. And it was under your direct supervision to follow up these cases?

A. It was.

Q. And you cannot recall?

A. I could get the exact number, if you wish me to.

Q. I say you cannot recall.

A. No, I cannot.

Q. Now you said you hired Mr. Matey.

A. I did.

Q. And Mr. Davis says he hired Mr. Matey, which is it?

A. Both.

Q. Both of you were present at the same time when Mr. Matey was hired?

A. Exactly. I am the employment manager, and I usually have the foreman pass upon candidates for his own de- [fol. 1094] partment.

Q. Was George Matey always healthy while he worked for your company?

A. So far as I know, yes.

Q. Well, you were there, weren't you?

A. Yes, and so far as I know, he was; I am not a doctor. He always looked healthy.

Q. How many times was he treated at your plant hospital that you know about?

A. A great many times for the itch.

Q. Yes, and you said you had conversations with him about compensation, and so forth, didn't you?

A. Yes.

Q. Did you pay him compensation?

A. I did.

Q. What for, what was the cause of the compensation?

A. I paid him compensation.

Q. Your company paid him?

A. Well, I paid him.

Q. Yes, all right.

A. For the time that he lost on account of the itch.

Q. What was that diagnosed as, do you know?

A. It was originally diagnosed by our plant physician as a possible occupational itch, and later diagnosed by Dr. Oleynick as positively non-occupational.

Q. Do you remember, sir, what the Labor Department [fol. 1095] put in their records that you know?

A. I remember there was a hearing before the Labor Department, and the itch was definitely stated to be non-occupational and non-compensable.

Q. Would it be wrong, Mr. High, if I told you that compensation was paid for dermatitis?

A. I have already told you that I paid him compensation, but that later, at an informal hearing before Referee Wilkie——

Q. I heard that. I say, would I be mistaken, sir, if I told you that he had been paid compensation for dermatitis?

Mr. Rudner: Your Honor please, dermatitis is a general classification for the itch; any hand rash is dermatitis.

Mr. Turtur: There is another speech by Mr. Rudner; I merely ask is it so, your Honor please.

Q. Is it so or not?

A. I have told you it was.

Q. It is. Dermatitis is not just that itch, is it?

The Court: Have you got the record of the Labor Department?

Mr. Rudner: I have a copy of it here, your Honor please.

[fol. 1096] The Court: Let's have it and not have any more disputes.

Mr. Rudner: All right.

Mr. Turtur: Will you admit, Mr. Rudner, that these are forms as furnished by the Labor Department?

Mr. Rudner: I have never seen them. You will have to ask Mr. High.

The Court: Is there a finding?

Mr. Turtur: Yes, your Honor.

Mr. Rudner: I have never seen them before.

The Court: That is no finding of the Labor Department. It is the signature of this witness.

Mr. Rudner: "No time lost on account of dermatitis."

The Court: By this witness; that is what he said. You are trying to give the impression there was a finding by the Labor Department; that is not so.

Q. What was he paid for?

A. I explained to you he was paid compensation because of time lost, because our own doctor, who did not claim to be a skin specialist, diagnosed it originally as possibly occupational, and rather than argue about the matter, we paid him. Later the Labor Department had an informal hearing before Referee Wilkie and decided that it was not [fol. 1097] compensable, but we had already paid, and were perfectly willing to have done it.

Q. And when was the hearing?

A. I think it was on April 4, 1934, in connection with a wrist condition and other conditions that Matey cared to bring out.

Q. In 1934 that was due to a wrist condition, wasn't it?

A. Both matters were discussed at that time.

The Court: Why do you call it an informal hearing? Isn't there a record of it?

Mr. Rudner: The Department of Labor, yes. The referee writes out his holding, his own opinions and findings; also the doctor's opinion, who is examined.

The Court: Where are they?

Mr. Rudner: They are over at the Department of Labor.

The Court: I should have thought they would be relevant. That was only a month before he went to the hospital. Did he make any complaint about his bronchiectasis or cough?

Mr. Rudner: Four months.

The Court: Did he?

Mr. Rudner: No.

Mr. Turtur: We don't know Your Honor please. The [fol. 1098] records of the Department, as taken from the Department of Labor, show several times when he was out, and he now says 1934. The 1934 one was only for the wrist, and it is exactly what was stated in the testimony.

The Court: Mr. Hifh says it was before 1934 or 1933.

Q. Now, I ask, were there any other times when you paid him compensation, and if so, what for?

A. I said he was out several times. I don't know how many times.

Q. Why do you look over there? Look at me, please. Do you remember the dates, or don't you?

A. No, I don't. I can get them, I have them on the table, if you wish them.

Q. Will you get them, please?

The Court: What is the relevancy of this?

Mr. Turtur: To show, your Honor please——

The Court: I think, if anything, it is unfavorable to you.

Mr. Turtur: It is just the credibility of this gentlemen, that's all, your Honor.

The Court: I say, if there is any inference, it is unfavorable to you, I should say.

Mr. Turtur: Well, your Honor please, this is the record.

[fol. 1099] The Court: It now appears that Matey made some claims against this company before the Labor Department, and that hearings were held. Now if he didn't complain about his cough, I should have thought——

Mr. Turtur: Well, your Honor knows and you can teach me the subject, that this matter we are trying here today is not compensable under our workmens' Compensation Act, so he couldn't make any claim in a department that hasn't any jurisdiction, and he didn't know anything about it until after he left the plant.

Mr. Rudner: All done by agreement.

Mr. Turtur: Not all done—what agreement? That is very unfair, your Honor please. May I ask what he means by that? What do you mean by that, Mr. Rudner; all done by what agreement?

Mr. Rudner: The company paid compensation by agreement.

Q. No dust there, you say, at all in those departments, other than very little; is that so?

A. That's right.

Q. That is in the mix room, and in the silicate room, and also in the phosphate department?

A. That's right.

Q. Very, very favorable condition?

[fol. 1100] A. Yes.

Q. That's all, Mr. High.

Mr. Rudner: Does your Honor want the records of the compensation department?

The Court: No.

A Juror: Your Honor, may I ask a question?

By a Juror:

Q. Mr. High, are the windows in the plant always open, such as the day we were in the plant?

A. Except in extremely cold weather.

Q. Other times they are always open?

A. Yes.

Q. What happened if you have a wind storm there with the dust? For instance, in the mix room, say an inch to two inches on the platforms in the upper level, if you have a wind storm come up what happens to the dust, the settlement up there on all those timbers and rafters, and so on? In other words, is the dust condition greater on a windy day there?

A. I wouldn't say it was, no. Those windows all swing on a center pivot, and give ventilation above and below, as you probably noticed.

Q. But the rafters and beams there where this settlement is was also below and above the windows?

A. Is that on the upper floor or below?

Q. Along the other levels outside of the first level that we [fol. 1101] wnet in first.

A. I couldn't answer your question.

Q. In other words, it is too heavy, by the air coming in the windows, to circulate the dust. It just stays there, it is so heavy?

A. (No answer.)

By Mr. Rudner:

Q. The windows, how do they operate in your factory?

A. Most of them operate on a center anchorage, so they turn on a pivot.

W. Just one question, Mr. High, in connection with these cases of skin rashes of which you speak, is there any particular time of the year when they come about as against another time?

A. Only in the summer time.

The Court: That's all, Mr. High.

Mr. Rudner: Just Mr. Davis a short question.

The Court: One question, you promise, Mr. Rudner.

Charles T. Davis, recalled.

Direct examination.

By Mr. Rudner:

Q. Mr. Davis, in connection with dust, when it does form on the walls and fllors, how does that form?

A. Any dust containing soda ash due to what we call the [fol. 1102] hydroscopic action of soda ash, that is, it will absorb moisture, and through a period of time it forms a crust, and binds itself together. The moisture in contact with the soda ash, goes to a hydrated form, and also the CO_2 the air will gradually cement that with bicarbonate, so it wouldn't be as likely to be blown around as a freshly deposited dust.

By Mr. Turtur:

Q. How about if it is freshly deposited upon the beams and rafters, and every place these windows, are, if and when they are open?

A. The fresher the dust, the more likely it is to be blown around.

By a Juror:

Q. How do you account for the fact that on the third and fourth levels we gathered some of that dust apparently of about ¼ inch thick?

A. On the beams, you mean?

Q. Beams and rafters.

A. That would be an acute——

By a Juror:

Q. Mr. Davis, as a matter of fact—pardon me for interrupting—as a matter of fact, when I went up on the landing to get a sample of that dust, that soda ash, or whatever it is, it was not a quarter of an inch thick, but it was thick enough so I coulf scoop it up with my hand and get a hand- [fol. 1103] ful in one scoop. I will tell you where I got it,— up on the top landing in two places; half I got in one spot, half in the other; one on the railing, see, right up there, and one right on the floor. It was kind of thick.

Mr. Rudner: That is the mix room.

The Juror: Yes.

A. That is no doubt an accumulation over a great period of time. You will find, for instance, in the old fashioned stable a considerable amount around the rafters.

A Juror: Don't they clean there?

Another Juror: It was swept on the first level.

The Witness: Well, unfortunately, they are not as good housekeepers as they ought to be, as I find, so they don't clean behind their ears. They get in the very evident places, but not in the corners.

A Juror: Don't get me wrong. This was not in the corners, it was around the platform.

The Witness: I mean by corners around the out of the way places.

A Juror: You have a greater amount up there than down on the lower level.

The Witness: Yes, I believe we have.

[fol. 1104] A Juror: When the heavy ash is put in there you have all of your wheels operating?

The Witness: Yes.

A Juror: And that is when the greater part of the dust exists?

The Witness: Yes, and that is at the discharging point of the elevator when you are up on the top.

A Juror: The day we were there, this other apparatus wasn't working, so we wouldn't have seen the dust conditions as they would happen later on when that machine was in operation.

The Witness: I don't know just exactly the particular point of the operation when you were there. The apparatus was operating, but it may not have all the wheels as I say, turning at that particular moments.

By Mr. Rudner:

Q. Mr. Davis, does a man work on the upper platform in that mix room?

A. A man hardly ever goes off of anything but the lower floor and one flight up, because that is where he really does his work. The only time he goes way upstairs to the top platform is sort of an inspection trip, or belt breaking,/or something.

Q. When is he on this first landing?

[fol. 1105] A. That first landing you mean above the ground floor?

Q. Yes.

A. From that position he opens and closes the mixing room and places a chute in to introduce sand and soda ash. Then he comes downstairs, and goes back up there to close it after it has been discharged.

Q. During the actual discharging operation, he is not there at all?

A. No. He will start the apparatus discharging and go out in the other section of the building and out back and forward. He doesn't have to be present when it is discharging. He removes the cover, pushes over the belt shifter, and comes back maybe 15 minutes later to stop it.

A Juror: Mr. Davis, in all fairness to the court, I don't think that the question has been thoroughly straightened out in reference to the furnace proposition. Now you know, of course, you haven't been there at the time we made the inspection, there was a question I asked at the time that small pop or explosion occurred, that you attributed to the fuel oil. Now I want to straighten that out. I want to get the thing straight in my mind, and I don't think the court has got fully the real explanation. I asked the question and I think the court clerk was there at the time—he wrote it on a [fol. 1106] paper—I wanted to find out what the fumes were that came off that soda ash when it hit the high heat and the air, what chemical change was arranged in there.

The Witness: When I said the other day it might have been some acid, some reaction there in the fuel oil, there is no acid there, and the soda ash fumes is most likely responsible for the effect you got. Now soda ash—I looked up last evening—melts at 846 degrees Centigrade, that is approximately a thousand degrees Fahrenheit. I had a man looking up this morning at what point it would volatilize. Soda ash volatilizes as such—in other words a good many chemical analyses in the laboratory are conducted by first getting the material in solution. You take a material that is very difficult to get in solution, you take and dissolve it in molten soda ash, but there is no change in soda ash on heating of itself, it will volatilize as soda ash.

The Juror: And yet we had some testimony here that one of the methods for converting sodium carbonate into sodium oxid preparatory to the forming of sodium hydorxid was by heating sodium carbonate to a temperature, I believ-, of 500——

A Juror: Five or six hundred degrees.

[fol. 1107] The Witness: That is not a commercial method in a laboratory of itself, no, it cannot be done.

A Juror: You mean you need some sort of catalyst there.

The Witness: You have to have some other chemicals.

A Juror: My Davis, I don't think you have answered my question fully, yet.

The Witness: I am sorry.

A Juror: What I have been trying to find out is this: when we were all on the platform in front of the furnace, where the feeders are, that-explosion happened. I want to find out what is that irritating effect it had. Maybe you cannot tell us becuase you are not a physician, but I want to find out if you know what is that irritating effect caused on the membrane which caused us all to cough.

The Witness: From my own experience, I would say it was the soda ash dust itself. I don't think there would be any argument on it, that is, the soda ash as soda ash. The heat has not converted any of that soda ash to another chemical.

A Juror: There was no chemical change?

The Witness: Not with heat, no sir.

[fol. 1108] A Juror: Heat tends to dry out. In other words, we had before that the thing that caused this settlement up on the upper platform in the mixer room was because of the moisture. Just as soon as it was in the furnace, that intense heat immediately diffused into finer dust, and that is what made us cough. In other words it got down in our lungs.

The Witness: Around the furnace, being warm, it would have a tendency to fly.

A Juror: Heat makes finer particles of dust?

The Witness: I don't want to confuse you gentlemen. I did state there might have been some products of fuel oil combustion at that time; sometimes they are rather irritating or peculiar in odor.

A Juror: I didn't see any back draft at that time.

The Witness: There could have been, but I doubt that there was.

A Juror: I didn't see any back draft at that time.

The Witness: The furnace is generally under an in pull, and there is sufficient draft to not only take away all the [fol. 1109] products of combustion, but also put a little air into the furnace.

The Juror: In other words, heat applied to the soda ash increases the irritating effect?

The Witness: No, it wouldn't increase the irritating effect, it would increase the ease with which it becomes blown about, because it would be dry.

A Juror: You testified regarding the number of times this puffing occurred.

The Witness: Yes.

The Juror: It seem-d very strange that when the first puffing occurred, we ask your—one of your assistants, I think it was Mr. Hammond in charge.

Mr. Rudner: Mr. Murphy. Hammond was in the phosphate.

The Juror: I beg pardon, then it was Murphy—asked how often it occurred. He said maybe once a week, but we had hardly gotten off that platform before it occurred again within a very few minutes.

The Witness: He was possibly referring to the complete operation there. In other words, you may not at the first little puff you get there, break down the arch and complete it; you may just partially break it down, you see, sometimes [fol. 1110] according to the size of the arching, or the empty space at the bottom of the hopper, you may get one little slide inside the material and still have some arch later, and it may come again later. It may happen more than twice. That is a possibility, although it is rare that it doesn't all occur at one time.

Mr. Rudner: The defense is through.

The Court: You rest, Mr. Rudner?

Mr. Rudner: Yes, your Honor.

Defendant rests.

The Court: Now you have this employe here, what is his name?

Mr. Turtur: Felix Smeitana.

The Court: Before calling him, if you are going to—he ought to go back to work——

Mr. Turtur: Well, I have an architect here, your Honor please.

The Court: Did you want to call this man?

Mr. Turtur: Yes, sure. Mr. Smietana.

The Court: Your architect would take more than twenty minutes, wouldn't he?

Mr. Turtur: I don't think so, your honor. I am going [fol. 1111] into the question of ventilation with the architect and the conditions as he found them when he went there, if you want it.

Felix Smietana, called and sworn on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Turtur:

The Witness: I want other guy.

Mr. Marshal: You want an interprester, you cannot speak?

Mr. Turtur: I will try it in English, your Honor please.

The Court: You understand, Mr. Smietana you just tell the truth nothing will happen to you, nobody will fire you; the company won't fire you, you have got a life job there.

Mr. Turtur: With civil service, too.

Q. Felix, you met this gentleman night before last, didn't you, at your house, Mr. Blachman, this man right here?

A. Yes.

Q. He came over to your house to talk to you the other night?

A. Yes.

Q. And he asked you, did he, if you worked for the Grasselli Chemical Company?

[fol. 1112] A. Yes.

Q. And how long have you been working there?

A. Down Grasselli? 27 years.

Q. 27 years, and you work in what department?

A. What department? I forget about that work.

Q. Well, silicate, phosphate?

The Court: Give him the years that you want.

Mr. Turtur: I don't want to lead him, your Honor.

The Court: But say during the time, whatever these years were.

Q. From 1928, October, 1928, to about November of 1933, where did you work?

A. I think I work down Lithepon.

Q. Did you work*ed* in the silicate department?

A. Yes, worked one times.

Q. When you worked in the silicate department, did you come in contact with soda ash powder?

A. No, I no work for soda ash.

Q. What department did you work?

A. I work on the silicate presses.

Q. And during the time that you worked for the Grasselli Chemical Company did you ever suffer any skin rash?

A. I work phosphate I got skin disease.

[fol. 1113] Q. You did?

A. Yes.

Q. And then the company sent you with Mr. Matey over to a doctor in Elizabeth, that's so, isn't it?

A. Yes.

Q. Now let me ask you this: About nine months ago, only about nine months ago, did you get any more skin rash?

A. Right now, no.

Q. Nine months ago. Today is June. I mean last October, or last November, or September.

A. No, all clean.

Q. All clean?

A. Yes.

Q. Didn't get any skin rash nine months ago?

A. No.

Q. Sure of that?

A. Sure of that.

Q. Now, Mr. Smietana, Judge Clark, he told you, don't be afraid.

A. I no afraid for anybody.

Q. You won't get fired.

A. Nobody kill me.

Q. I know, nobody will kill you, don't be afraid; all right. I want to ask you again——

A. All right.

[fol. 1114] Q. —did you get a skin rash?

A. Yes.

Q. While working for the Grasselli Chemical Company only nine months ago?

A. No, I have no——

Q. Sure of that?

A. Sure of that, I have no this time.

Q. How long ago was it when you got this skin rash?

A. About two years, February 2nd, February, two years.

Q. About two years ago?

A. Yes.

Q. And since then you worked some place else?

A. Yes, I worked some place else.

Q. Where do you work some place else?

A. I work down Glaubers salts.

Q. And that is a different department than when you got the skin rash?

A. Yes, different department.

The Court: He told us he worked in the phosphate department.

Mr. Turtur: When he got the skin rash.

The Court: Whereabouts in the phosphate?

The Witness: I worked dry soda.

The Court: Dry what?

Mr. Rudner: Trisodium phosphate.

[fol. 1115] Q. And that dry soda phosphate, that is soda ash?

A. I don't know. I no chemist, I don't know nothing about it. I no dry soda.

Mr. Turtur: He said "dry"; there was a chorus of "tri".

Mr. Rudner: The phosphate department is the trisodium department.

The Court: Ask him if that is where he worked. Point the department out to him.

By Mr. Turtur:

Q. Mr. Smietana, do you understand a map like this?

A. No.

Q. You couldn't understand it?

A. I no go school.

Q. You no go to school—in the phosphate 50 feet away from where they dump the phosphate rock.

A. I don't know where they dump the phosphate rock.

Q. You know the phosphate rock goes upstairs, then they dump it in the phosphate department.

A. I never was, I have no time; they get it too far some place over there.

Q. Well, you say you got this skin rash when you worked in the phosphate department.

A. Yes, dry soda, I got that.

Q. And that dry soda is in that big tank in the phosphate [fol. 1116] department, isn't it?

A. No, they got driers round and round.

Q. The driers in the phosphate department?

A. Yes.

Q. That is the white powder, isn't it?

A. Yes, white stuff.

The Court: If you are trying to make him say that he came in contact with soda ash, I think you are wrong and are misleading him.

Mr. Turtur: Well, I don't know of any othere way I can ask him. The only reason I produced him, I asked if this gentleman suffered any skin rash.

Mr. Rudner: He says he got it from dealing with trisodium.

Mr. Turtur: He said dry sodium; that is what I understood. The chorus came "tri" sodium, and then we have evidence that this gentleman Matey worked 50 feet away where the soda ash was, and there was dust there. Now if this gentleman cannot give it any clearer, I cannot help it.

The Court: How did you work in it, did you work with your hands?

The Witness: No, we have machine dryers. You watch everything was run all right, O K.

The Court: What sort of machine.

[fol. 1117] The Witness: You know driers, round driers, he go round all the time. Soda come wet; after dry up, he go back, chute them for bins.

The Court: Nothing to do with the soda ash tank.

Mr. Turtur: He didn't say that, your Honor please.

The Court: I said it.

Mr. Turtur: Well, how does your Honor know?

The Court: Because he said he worked at a drier where wet sodium or soda——

Mr. Turtur: Well, here, your Honor, this testimony is that in the phosphate department Matey used to work up here, or up here in the storage tanks, and then he worked all around here, as I understand it. This is where the soda ash is.

The Court: Where are the driers? Point out the driers.

Mr. Davis: When we make trisodium phosphate in this department, I think Felix will probably recognize these. Here are the two driers. Felix, what are these up here?

Mr. Turtur: New counsel in the case.

Mr. Davis: Here is two trisodium phosphate driers.

[fol. 1118] The Court: Have we a picture of these driers?

Mr. Davis: No, sir, we haven't. They are just cylindrical equipment, and over here is where, about 50 feet away from that, is where the trisoda is packed.

Mr. Turtur: Now, Mr. Davis is testifying instead of Mr. Smietana. That is the 15th time you have been a witness.

Mr. Davis: I am trying to locate it. I might help out a little.

Mr. Turtur: Well, I know you are here to help out.

The Court: That's all, thank you.

Mr. Turtur: Thank you, Mr. Smietana.

Lauren Pohlman, called and sworn on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Turtur:

Q. Mr. Pohlman, what is yo[illegible]fession?

A. Architect.

Q. And as such architect, have you ever studied the subject of ventilation?

A. I have.

Q. What experience have you had in the field of ventilation?

[fol. 1119] A. Well, I designed ventilation systems in connection with buildings which I planned.

The Court: Did you ever build ventilators?

The Witness: Yes, sir.

The Court: Did you ever plan factories?

The Witness: Yes, sir.

The Court: What factories? I mean don't tell all of them.

The Witness: Well, I have had considerable experience in factories for the General Electric Company, the ventilating firm up here, the Carrier Engineering Company, and I have built some small factories under my own name, one was out here in the meadows, a small chemical factory, I don't recall the name.

Mr. Turtur: Do you want me to go any further?

Q. Now, you make an inspection of the silicate department, did you not?

A. That's right.

Q. On May 11, 1936?

A. Correct.

Mr. Turtur: Rather than to ask questions, your Honor, do you want him to tell what he saw?

The Court: Yes.

Mr. Turtur: And give his views as to ventilation?

[fol. 1120] Mr. Rudner: What he saw with respect to ventilation.

The Court: Yes.

A. (Continuing.) Well, we went through this building—I believe you term it the conference room, and the room on the left, which is the silicate room.

Q. Mr. Pohlman, perhaps this will help you if you want to get a mental picture of the place.

A. I think I can explain it off the map very well.

Q. Here is your mixing room?

A. Yes, we came in here and went down along these furnaces, and first up on to this furnace here, and then back through these runways in through here, in through the mixing room, and out again back in here, and up in this section—I don't know what you term this right hand side here—and then back in the metasilicate room, (indicating). There was evidence of cleaning in the——

Mr. Rudner: I object to that. This is 1936.

Mr. Turtur: He is telling your Honor please, what he has seen when your Honor gave an order for inspection.

The Court: Isn't it quite illogical for you to object to this when you yourself had dust tests made in 1936?

Mr. Rudner: We don't object to the physical condition, [fol. 1121] but the floors are cleaned every day during shifts, as I understand it.

Mr. Turtur: You didn't let him get started with what he was saying.

Mr. Rudner: I don't care what he says about physical conditions. There hasn't been a single change with respect to physical conditions; ventilation, he can go as far as he wants. Go ahead.

A. (Continuing.) There are considerable windows around this building. I would say about 30 per cent of them were open. The roof is what we call saw-tooth roof construction in which there are rows of windows, and most of those were open. In the mixing room the normal process of operation was not going on, but the machinery was in operation, and there was considerable dust in this mixing room, which apparently was due to the operation of the machinery, the air currents carrying the dust up and down. For instance, the roof of the toilet down in this section there was about——

Mr. Rudner: Now, your Honor please, there is most certainly an accumulation of dust every place. You don't clean every spot in every factor. That is unfair. I don't care what he testifies about ventilation, other physical details, but there is no plant in the world that wouldn't [fol. 1122] have an accumulation. This plant was there for years.

The Court: Well, the jury saw all that.

Mr. Rudner: Yes, you take——

The Court: Did you witness any operation?

The Witness: Yes, while we were there one of these cars was dumped up above which did make considerable dust, and it traveled downward rather that out the windows. There was no means of mechanical ventilation in the building that I could see. They depended purely on gravity ventilation, that is the normal air current flow, and where this material was dumped, after that we went up there. There was no method used to confine the dust in one location, nor was there any way to remove it mechanically. There was evidence of changes in the construction of the building, particularly the application of hoppers around openings in the wall where the belts went through, in which there was considerable dust, and there were some doors between different departments, which were evidence of newer construction.

Q. I show you——

Mr. Rudner: The doors have been changed from sliding doors.

The Court: It is admitted that the doors were changed.

[fol. 1123] Q. Is that what you mean, D2?

A. These were the hoppers. Now this, I assume, was to collect the dust which traveled on the belts which formed air currents within the mixing room, and therefore, even where there was no dumping operation going on, the dust was continually traveling around in circles.

Q. In where?

A. In the mixing room. Now there was also around the hopper in furnace No. 3, there were some cloths out around the hopper, apparently to keep the material in.

The Court: There was what?

The Witness: There was on the hopper in furnace No. 3, cloths.

The Court: Cloths?

The Witness: Yes, stuck into the hopper.

Q. I show you D4, and ask you if that will help you to tell?

A. Yes, around right in this hopper here and also in this one over here rags stuck in there.

Q. Now, what have you to say, Mr. Pohlman, with reference to the sufficiency of ventilation and whether that ventilation as you found it is a proper method or not?

Mr. Rudner: If your Honor please, I don't think the witness has gone so far as to qualify to that, unless he can make some preliminary statement with respect to the quan- [fol. 1124] tity of dust. Or course, the witness was only there for an hour or so, and I think any ventilation, I suppose is a matter of just general knowledge——

The Court: Well, I wouldn't suppose he would have to stay there all day. You may answer.

A. There was no arrangement for mechanical ventilation that I could see.

The Court: It is conceded there wasn't any.

Mr. Turtur: My question was, was it in your opinion as an expert a sufficient amount of ventilation there that you would consider it a proper ventilating system?

A. No, there was not.

Q. In which people would safely work?

A. No, sir.

Q. That's all.

Cross-examination.

By Mr. Rudner:

Q. Mr. Pohlman, you said you saw a buggy dumped in the silicate department.

A. Well, I didn't see the buggy itself turn over, but I heard a noise up there and noticed the dust.

Q. I want you to go to that map, that chart, and tell me where the dumping took place.

A. Well, of course, you don't show the runway on here.

[fol. 1125] Q. No, but with respect to the furnaces that will help. This is No. 3.

Mr. Turtur: No, that is No. 1.

A. This dumping took place approximately on the right hand side of No. 1 furnace.

Q. Would it surprise you to know, Mr. Pohlman, I was there at the time?

A. That's right.

Q. Would it surprise you to know that that dumping was in hot water, steaming hot water?

A. It would surprise me, yes.

Q. What you saw was steam coming up.

A. Absolutely not.

Q. All right, we will see it.

—. ——.

Q. Did you count the number of windows in the silicate room?

A. Which room is this?

Q. In the furnace room, I mean.

A. I started to, to tell you the truth, but didn't complete it, so I couldn't tell you how many windows were in there.

Q. You didn't count the number of windows?

A. Yes, I say I counted some, but didn't finish counting them.

Q. Your answer is you didn't complete your count?

A. No.

[fol. 1126] Q. So you cannot tell us how many windows there were in the furnace room?

A. No.

Q. Can you tell us how many windows there were in the metasilicate room?

A. Very few, about three or four.

Q. Would you mind stepping down here? This is the metasilicate room. That metasilicate room wasn't in operation that day, was it?

A. No, I don't recall any windows in here. I recall that door, and I believe—isn't there a partition in here somewhere?

Q. This is all marked in brown; supposed to be an exact representation of the metasilicate room.

A. I recall this door; I do not recall any windows here. There were several along here. I saw three or four, I guess it was three, right there, may be a couple up in the corner.

Q. That is all, Mr. Pohlman.

The Court: That's all.

Redirect examination.

By Mr. Turtur:

Q. Why didn't you finish counting the windows?

A. Why did I not finish?

Q. Why didn't you finish counting the windows?

A. Well, there were so many things to see, and we were [fol. 1127] trying not to stay there all day; I mean if you were to detail all those things it would take several days, and we were there only about two hours or so, about two hours.

Q. Don't answer this question until the court rules on it, will you please, because I expect that Mr. Rudner may object. During the time that you were there and making this inspection when this dust came down, did it in any way affect you insofar as your breathing was concerned?

Mr. Rudner: Which dust?

Mr. Turtur: Do you object to the question?

Mr. Rudner: Where, what dust?

Mr. Turtur: Any place in the building.

Mr. Rudner: Objected to.

Mr. Turtur: And more particularly around furnace No. 3, and also when this dust came down, when this bucket was emptied.

Mr. Rudner: I object as incompetent, irrelevant, and immaterial. The gentlemen of the jury were there. I think that is more positive evidence than this gentleman can give.

Q. That is all.

COLLOQUY

The Court: Is Dr. Schilling coming at two o'clock.

Mr. Turtur: We got in touch with him, and Mr. Blachman informs me that Dr. Schilling cannot come here until [fol. 1128] after his office hours, and they are after three o'clock, because of prior engagements. We have another witness; your Honor please, on the question of soda ash in the phosphate department, who actually saw Matey being subjected to the soda ash in the phosphate department, which is rebuttal testimony, unless you will concede that.

Mr. Rudner: Bring him on.

The Court: Well, bring him on at two o'clock.

Mr. Turtur: Now, your Honor please, so that I will know what to do, I have a few other matters that could be brought in by way of rebuttal by Mr. Matey.

The Court: All right jury.

(The jury retired at this point.)

Mr. Turtur: The only reason I would bring back Mr. Matey would be to state the fact that he worked in the mix room and was subjected to soda ash.

The Court: He said that at some length.

Mr. Turtur: All right, and then, your Honor please, he would come back to deny that he ever handed to Dr. Oleynick any chemical from the plant or elsewhere.

The Court: Sorry to say, if that is what he would do, I should take a very serious view of it. I think you had better [fol. 1129] not call him for that purpose, because I *I* wouldn't believe him.

Mr. Turtur: You wouldn't believe him?

The Court: I would not. He would then be denying the testimony of a perfectly reputable physician, who has no more interest in the case than I have.

Mr. Turtur: Why that man didn't know any more about it than the man in the moon, until after he was on the stand for half an hour.

Mr. Rudner: Your Honor please, I saw Dr. Oleynick six weeks ago. He told me where he got it.

Mr. Turtur: I object to what he said to Mr. Rudner.

The Court: There is no jury here. We can talk quite frankly.

Mr. Rudner: I was surprised when Dr. Oleynick testified as he did, I was stunned. I spent an hour in his office some weeks ago. He told me, "I said to the patient, 'bring me what you are working with'." He told me then he brought it in.

Mr. Turtur: That goes to show definitely that Mr. Matey didn't hand him any of these chemicals. Will you admit that if Mr. Matey were brought here that that is what he [fol. 1130] would testify to?

The Court: I would like that doctor here before three o'clock. We must finish today.

Mr. Turtur: I want to finish today.

The Court: I am going to start charging the jury at four o'clock.

Mr. Turtur: Maybe sooner, your Honor.

The Court: How about that doctor.

Mr. Turtur: Well, I am going to get in touch with him right away, your Honor.

The Court: Tell him to bring his records too.

(Recess.)

Afternoon Session

The Court: Go ahead.

Mr. Turtur: Your Honor please, I tried to get Dr. Schilling and it doesn't seem possible to get him right away. He is out on his calls and his office cannot get in touch with him.

The Court: I thought you said his office hours were to three o'clock.

Mr. Turtur: That is the information I got, and I called up as soon as I got out of the court room——

[fol. 1131] The Court: When will he be back?

Mr. Turtur: Sometime after two or two thirty. I said Judge Clark ordered him to be here at two o'clock, and to please bring the Matey records, and the girl at the office said she would try to get him if he called.

The Court: Well, we have got two hours. Go ahead with the other witnesses.

Mr. Turtur: Well, I have another witness, your Honor please.

The Court: I said go ahead wit- him, will you?

Mr. Turner: He isn't here.

The Court: Why isn't he here?

Mr. Turtur: Well, I was expecting him a- twelve o'clock, he was to work until twelve.

The Court: What is his name?

Mr. Turtur: It is Andrecia.

The Court: He was here before?

Mr. Turtur: Yes, and he would——

The Court: I am not going to let you state what he would say. Did you subpœnea him?

Mr. Turtur: No, but——

Mr. Rudner: He has testified, so I don't imagine anything he could say would be beyond what he has already testified to, I don't know.

[fol. 1132] The Court: Is that your only witness?

Mr. Turtur: That would be the only witness, your Honor please. I wouldn't burden you any longer. I feel as though we have got enough insofar as the medical testimony is concerned, unless if Dr. Schilling does get here.

The Court: Well, the trouble is, I don't know what you claim with respect to the injury. I don't quite know how to charge the jury.

Mr. Turtur: Well, your Honor please, if your Honor doesn't know what we are claiming——

The Court: The reason I don't know it is your claim two different things.

Mr. Turtur: No, I don't claim two different things, your Honor please. I will appreciate it if your Honor won't say that, because we came in on the theory on which our experts testified, and we are not changing nor deviating from that position one momemt or a bit.

The Court: Well, I think myself that it is a highly incredible theory.

Mr. Turtur: Well, as I said to the court yesterday, I think that is a very prejudicial remark your Honor please, but the experts are the ones who gave the testimony.

The Court: That is astonishing to say that is prejudicial [fol. 1133] to your case. The judge in the United States courts, as you know, has a perfect right to express his opinion on the evidence.

Mr. Turtur: I say it in the most respectful way, your Honor, please. I am expressing my view that I am not changing my theory one bit; the theory is exactly that on which the case was brought.

The Court: Well, is it your theory that he get an abscess, and that that's all he had, and that he got that from dust?

Mr. Turtur: Is your Honor through?

The Court: The reason I think it is an incredible theory is that your own questions that you kept asking and kept reading from Landis and Norris with respect to inorganic matter, or inorganic dust I think was the word you used,— you must have used it 20 or 30 times——

Mr. Turtur: I didn't refer to inorganic dust, your Honor please.

The Court: But you were quoting from them.

Mr. Turtur: I was quoting to the one place——

The Court: I say you were quoting from them.

Mr. Turtur: —in another book.

The Court: Yes, I understand that, but it is the same. The quotation was correctly taken from one book to the [fol. 1134] other, and you used the word inorganic—where is the word here?

Mr. Turtur: The only reason I used it your Honor please, is because of what the experts say that this is an inorganic substance, and Mr. Davis here——

The Court: Here is what you read, "In my experience one of the most frequent causes of bronchiectasis is prolonged exposure to inorganic dust."

Mr. Rudner: There is some more beyond that too.

Mr. Turtur: That bears out——

The Court: As I understand it, your theory must have been bronchiectasis.

Mr. Turtur: No.

The Court: Now you had Dr. Runnells, this morning say that it wasn't bronchiectasis, but an abscess.

Mr. Turtur. Well, Dr. Runnels stated that on direct examination too, that in his opinion, it was a lung abscess, and Dr. Gluckman stated it was a lung abscess. If the defense wants to come in on a different theory and say it was a bronchiectasis——

The Court: Then may I ask counsel why you read to the [fol. 1135] jury, I mean in front of the jury, this quotation which does not refer to lung abscesses at all, but refers to bronchiectasis?

Mr. Turtur: I didn't refer to that in specific words.

The Court: You read that sentence.

Mr. Turtur: I formed a question.

The Court: My recollection is you asked it in the form of a question, but you were reading from this book.

Mr. Turtur: No, not from that book, your Honor. I read from Graham Singer and Ballon, and in only one point where I formed a question that question was, "Isn't it true, Doctor, that a person who is subjected to inorganic dusts can get this condition?"

The Court: Bronchiectasis was the word you used.

Mr. Turtur: But they maintain that it is bronchiectasis, your Honor please. Then your Honor asked the question, If I am not mistaken, and if I am wrong you will please correct me, your Honor, about the abscess of the lung and bronchiectasis. Do you want me to read——

Mr. Rudner: Your Honor please, your Honor read from a portion of that book. I don't mind that, but if we are [fol. 1136] going to read a portion——

The Court: We have had the whole thing read several times.

Mr. Rudner: I suppose that's true. There is something about the membrane——

Mr. Turtur: I won't read it, because your Honor may not like it.

The Court: The doctor—I read that part, too, and the doctor says that it is not a bronchiectasis at all. He denied that it is a bronchiectasis.

[fol. 1137] Mr. Rudner: That is an opinion, your Honor please.

The Court: What do you think it is and what am I to leave to the jury? You are the plaintiff.

Mr. Turtur: The theory that I believe your Honor should leave to the jury is one the evidence submitted by the various gentlemen.

The Court: That is not a theory. An appellate court might very well take the view that there was no evidence to support a finding of the jury with respect to a lung abscess, whereas they might take a contrary view as to bronchiectasis.

Mr. Turtur: But that is where the difference of opinion come in.

The Court: All right, you are willing to take the risk then?

Mr. Turtur: Yes, your Honor please, on the evidence that was submitted.

The Court: All right. Bronchiectasis is out then.

Mr. Turtur: Let the jury decide, your Honor please.

The Court: No, no, I have to charge the jury with respect to your contention.

[fol. 1138] Mr. Turtur: How can your Honor do that, because on the other hand you would be destroying what the defense says. The defense doctors come in and say it is not a lung abscess, it is a bronchiectasis. It is a question of fact for the jury. They have heard both sides. There was one specific question that your Honor asked and I don't know, I may be misquoting your Honor, I don't mean to; I may have asked it, whether or not bronchiectasis and lung abscess are not closely associated and their own witnesses say yes.

Mr. Rudner: Your Honor the plaintiff in every case has the affirmative and positive duty of proving what he contends; it cannot be left in the field of conjecture and speculation.

Mr. Turtur: I am not leaving anything in the field of conjecture and speculation, I am relying solely, purely and strictly upon the evidence submitted before this court and jury by my people and it is a jury question, your Honor please, whom they want to believe, whether they want to believe it is a bronchiectasis or whether they want to believe it is a lung abscess. Our men say it is a lung abscess.

[fol. 1139] The Court: Well, I never heard, and I can scarcely believe, that you are serious in thinking that the jury can take the defendant's witnesses and use their theory of the case to find for the plaintiff on.

Mr. Turtur: But your Honor please, I am only relying upon what my experts stated.

The Court: Well, then, I just wanted to be sure what you claim, that's all.

Mr. Turtur: I claim that my experts are right.

The Court: All right. I am just telling you that the Court of Appeals might take a contrary view of your experts' testimony.

Mr. Turtur: I am willing to take that chance, your Honor please, because of the fact that that is the theory upon which this case was brought.

The Court: All right. All right.

Mr. Turtur: We rest.

Mr. Rudner: Just one very short witness.

Charles T. Davis, recalled in surrebuttal on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rudner:

Q. Mr. Davis, did Mr. Felix Smietana work in the phos-[fol. 1140] phate department?

A. Yes.

Q. Will you tell us where he worked?

A. In the trisodium——

Mr. Turtur: Your Honor please, I object to this; Felix Smietana was not brought here for any purpose of where he was working. Felix Smietana was brought here for the purpose of letting your Honor and the jury know whether he was subjected to any skin rashes because of their evidence brought in.

Mr. Rudner: I want to show what he worked at.

A. When he was operating on trisodium phosphate he was operating in these driers here.

Q. How do you spell it, tri or d-r-y?

A. The workmen sometimes call trisodium phosphate——

Mr. Turtur: Now, your Honor, not what the workmen do.

Q. What did they work with?

Mr. Turtur: I object, just a minute. I object to what the workmen called it, your Honor please; it is only what the jury heard.

Q. What did he work with?

A. Trisodium phosphate.

[fol. 1141] Q. T-r-i?

A. T-r-i, yes.

Q. Is that soda ash?

A. It is not.

Q. All right, and did he get a rash in connection with that particular chemical?

A. He did.

Q. And one other thing, now; In the silicate department there is a dumping operation, I understand, around furnace No. 1 and 2; what is that operation?

Mr. Turtur: I object, we have been all through it. This is improper surrebuttal.

A. Glass is dumped into one or both of these two autoclaves from the platform above.

Q. What do they contain?

A. The dissolving operation for glass is conducted with these autoclaves approximately half full of water before you dump the glass; that is the water which dissolves the glass.

Q. There is another dumping operation somewhere with a buggy; isn't that in glass?

Mr. Turtur: Must we go all through this again? We have been through it a number of times.
The Court: Yes.

Q. All right. That's all Mr. Davis.

Mr. Rudner: We rest.

[fol. 1142] Mr. Rudner: I have a motion to make. Does your Honor wish it made in the presence of the jury?
The Court: Yes.

Defendant's Motion for Directed Verdict

Mr. Rudner: I move, sir, that a verdict be directed in behalf of the defendant against the plaintiff on the following grounds:

(1) There is no proof of negligence in this case with respect to the operation of the silicate department or the phosphate department. Of course, it is elementary that negligence cannot be presumed, it must be established as a fact.

There is the further fact that there is no proof, if we assume negligence, that it was the proximate cause of the injury sustained to the plaintiff in that Dr. Gettler's first testimony was completely and solely predicated upon the fact that the combination of moisture and soda ash and these two other powders resulted in sodium hydroxid, which was a high powered chemical, and that the coming into contact of the sodium hydroixd with the tissues of the lung causes these difficulties and all his conclusions with [fol. 1143] respect to the effect upon the tissues were predicated upon the formation of the sodium hydroxid. Upon being brought into court the second time that was completely changed and he admitted that it did not form a sodium hydroxid but the process of ionization formed a chemical with some causticity; and based upon his own testimony there is no proof that this changed the chemical which went through the process of ionization. Your Honor please, that is important. There is no proof on the part of Dr. Gettler that this new form of soda which results not through hydrolization but through ionization would have these same effects. In other words, the sodium hydroxid having been completely eliminated from this case, everything that Dr. Gettler said with respect to the possible results of the coming in contact with sodium hydroxid of lung tissue is out of the case, and what he did say finally has no basis in this case, in other words, that the fundamental premise upon which the plaintiff has predicated his case has been completely gone by the change of testimony of Dr. Gettler.

I further say, sir, that in any case of negligence the matter of knowledge is a fundamental and essential element, [fol. 1144] and in the absence of knowledge to the effect that the inhalation of these dusts would cause similar injuries as complained of, there cannot be a charge of negligence as against the defendant company. And the proofs in this case are absolutely completely contradicted that never in the history of this plant has there ever been a case of an injury to the respiratory organs or the lungs resulting from the inhalation of the three dusts.

The Court: The chemistry seems to be about this: This is the book that Dr. Wiener was testifying from. "The results is that as a result is that a solution of sodium carbonate contains a greater number of hydroxyl ions that hydrogen ions; therefore it reacts alkaline but only feebly so, for the concentra-ion of the hydrogen ions is necessarily small since they can be formed only to the extend that undissociated carbonic acid is produced." That seems to be the situation. It was about four to one, as the Doctor testified, between sodium carbonate and sodium hydroxid.

Mr. Rudner: It forms this feeble caustic. Dr. Gettler [fol. 1145] based his conclusions upon sodium hydroxid unadulterated in its full absolute strength, and that conclusion was not changed until he came into court the second time and changed his story with respect to the ultimate result of a combination of soda ash and——

The Court: I remember the testimony. Go on.

Mr. Rudner: And I say in view of the fact that defendant's testimony, which is uncontradicted, is that no other person in the known history of this plant has ever suffered any injuries to the respiratory organs and lungs, and in view of the fact that we have produced men from the greatest manufacturer of soda ash in the country, who have had the same experience with no such injuries, the essential element of knowledge is absolutely not available and the charge of negligence falls.

The Court: I want to know the law on how much knowledge a manufacturing company has to have of the deleterious qualities.

Mr. Rudner: I just gave you a case.

The Court: There must be more law than that.

Mr. Rudner: That is a complete copy, just came in in this morning's mail.

[fol. 1146] The Court: No, I say there must be more law than that.

Mr. Rudner: Well, I gave you, your Honor has a memorandum there in front of you, which covers that; it is on page 3 and 4. Of course, we all know that knowledge is bases upon experience. Experience——

The Court: Is this case——

Mr. Rudner: The case I just handed you is not on the memorandum. It is a new case came in this morning.

The Court: I mean injury to workmen. That Gladiolus case you are so fond of I don't think is in point.

Mr. Rudner: The case before your Honor is like this case, an injury to employee.

The Court: Haven't you more cases than that? There must be a lot of law on that point, I mean of injury.

Mr. Rudner: There is the Eighth Circuit case at the bottom of page 3. Of course, that deals with a different situation. But, your Honor please, all these cases, the silicosis cases, the other cases, you always find affirmative proof on the part of the plaintiff that other men working under the same circumstances and conditions, have suffered [fol. 1147] the same particular injury of which the plaintiff complains. In this case the record——

The Court: What I am getting at is this: radium for instance, is known to be a dangerous substance and I don't suppose that you have to show that there was actual knowledge with respect to the dangerous properties of radium. This sodium carbonate is in an enitirely different class. Are you listening to this Mr. Turtur?

Mr. Turtur: Yes, your Honor.

Mr. Rudner: Of course, knowledge is an essential element in any charge of negligence, I mean negligence is predicated upon experience, it is the element of experience. We know things happen because of experience.

The Court: Well, in the silicosis cases what amount of knowledge was required on the part of the plaintiff?

Mr. Rudner: I don't know.

The Court: A great many of these dust cases have been litigated and a great many have reached appellate courts and there therefore have been opinions. Now, where are they?

Mr. Turtur: I have some here, if your Honor wants to [fol. 1148] take my memorandum.

Mr. Rudner: Your Honor will find all those cases, other employees have testified with respect to similar injuries and there is some information brought to the company.

Mr. Turtur: I have a memorandum if your Honor wants to look at any memorandum.

The Court: I want any case that is illuminating.

Mr. Rudner: That Eighth Circuit case on the bottom of page 3 covers that rather fully; of course, it doesn't cover——

The Court: Gladiolus. Don't give me that again, it is not in point.

Mr. Rudner: Well, the law is the same; the case I had before your Honor, is an employee.

The Court: Yes, that is *ture*, but you haven't it in the record.

Mr. Rudner: That is an exact copy of the opinion.

The Court: I know but I cannot tell——

Mr. Turtur: Here is one, Davis vs. New Jersey Zinc Company, Court of Errors and Appeals.

The Court: Yes, that is the manganese case.

Mr. Turtur: Yes, your Honor. And here is a memorandum that I have which covers all of the subject matters [fol. 1149] as expressed by Mr. Rudner:

The Court: Well, listen to this, Mr. Turtur, this is just what I have been wondering about for some days. "While manganese dust as a source of poisoning presents to some extent a recent acquisition of knowledge, nevertheless there was evidence which indicated that the defendant was chargeable with notice of its dangers. Numerous cases of manganese poisonings had their origin in its plant and since 1918 it employed consultants for its dust poisoning problems."

Mr. Turtur: Yes, and I will answer that, your Honor. Does your Honor want a more clear and succinct statement than this by Mr. Davis: "I have seen a mixture of soda ash in times past but not in recent years on the belts because it has a destructive effect.''

The Court: The belts.

Mr. Turtur: Now, wait. If it has such a destructive effect, and they knew about it, upon the belts, what can it be to the mucous membrane of the human system?

The Court: That is a preposterous statement.

Mr. Turtur: Why, that is there in evidence, your Honor please, verbatim.

[fol. 1150] The Court: In the first place, you are not quoting all his testimony.

Mr. Turtur: Well, I am quoting——

The Court: Now, what evidence is there in this case that they have the slightest knowledge that this soda ash, this sodium carbonate, was dangerous to the lungs?

Mr. Turtur: Your Honor please, their own testimony by Professor Smyth of the Pennsylvania University says anything that is detrimental to the skin is detrimental to the lung, and more so. Now, then, what knowledge did they have? They had the knowledge of the many cases that they treated for skin irritations and the skin irritations, bringing out by their own witnesses to the effect that whatever is irritating to the skin is irritating to the lung, certainly, gives these people knowledge of the many years for which they have been treating these skin conditions when they were subjected to soda ash.

The Court: You gave me a case which you said had some bearing, in which the sentence appeared: ''Numerous cases of manganese poisoning had their origin in its plant, and since 1918 it employed consultatns for its dust poisoning problems.'' Now, please get me—you have shown, not [fol. 1151] numerous but one or two cases of skin irritation and from that you are trying to show that they had knowledge that it was dangerour to the lung and would produce lung abscesses to breathe this in.

Mr. Turtur: Oh, your Honor please, we cannot say that. We say——

Mr. Rudner: Your Honor please——

Mr. Turtur: Now, wait a minute, the court is asking me a question. I didn't give your Honor any information as to one or two solitary cases of the people that had been treated for skin diseases. Your Honor heard from the lips of their own witness that they had treated other people for this skin disease, or rather skin rash, which people had been subjected to the soda ash.

Mr. Rudner: In the summertime.

Mr. Turtur: Well, whether it is in the summertime or in the winter.

Mr. Rudner: In the summertime, sir, around the wrists where the sleeves irritated it, and Dr. Oleynick in connection with this particular gentleman made tests of this powder and found them negative, found them positive with respect to a fungus.

[fol. 1152] Mr. Turtur: Your Honor please, they brought in their own witnesses to show that they knew of this condition because anybody that was treated for this skin rash was always subjected to this soda ash department, whether in the mix room or elsewhere. Now, if that isn't knowledge going back from 1920 to 1925, your Honor please—and Mr. High this morning stated that there were some cases but he didn't remember how many, from 1920 to 1925. Then I asked him "How many in the last five years?" "There were some but I cannot recall how many." Now, if that isn't knowledge, going all the way back to 1920, your Honor please, when this skin rash comes as a result of being exposed to this soda ash, I will say that that is more than ample knowledge for the court in which to leave the matter to the jury.

Mr. Rudner: May I have a fraction of a minute, Mr. Turtur? If your Honor please, there is not a scintilla or suggestion in this case of knowledge of any employee or officer of the defendant company that the inhalation of any of these dust would do any injuries to the respiratory organs in any respect whatsoever, and the doctrine in the Federal Court [fol. 1153] is not the scintilla rule but the rule of substantial evidence.

Mr. Turtur: Your Honor please, I hope Mr. Rudner——

Mr. Rudner: And, sir, there is not only not even a scintilla but there most certainly, not being any scintilla of evidence, it follows that there is no substantial evidence.

Mr. Turtur: Your Honor please——

Mr. Rudner: May I finish, please?

Mr. Turtur: Sure, that's all I have been asking of you all the time.

Mr. Rudner: To permit of a suggestion of knowledge on the part of the defendant company with respect to these possibilities, if they are possibilities.

Mr. Turtur: My worthy adversary, your Honor please, is ~~perhaps confused~~ as to the law, for if you read the case of Birlet vs. Lehigh Valley Silk Mills, reported in 287 Federal, page 369, 365 (reading from case). And they also cite Snare & Triest vs. Freedman, 169 Fed.

The Court: I agree with that and I am fair to follow the case which you gave me, which seems to be against you.

[fol. 1154] Mr. Turtur: That is only as to the manganese dust, and that only goes to the question of knowledge.

The Court: That is the question we are arguing.

Mr. Turtur: All right. But here is a question of knowledge and I say to you that was back in 1920 these people started to treat conditions of the skin due to soda ash dust. Now, isn't that knowledge, your Honor please, 16 years ago?

The Court: If this many was trying to recover for injury to the skin on his hand——

Mr. Turtur: Why the resulting thing is the things that counts, your Honor please. Their own professor——

The Court: Please don't shout.

Mr. Turtur: Well, I don't mean to shout, your Honor please, it is the tone of my voice and I don't mean to be disrespectful by shouting.

The Court: I don't mind that but it is so hard to follow you.

Mr. Turtur: Your Honor asks me what knowledge you impute to the defendant company and I say to your Honor that all their own testimony, not mine but all their own, [fol. 1155] and that is evidence, plus mine of course, is that there had been other cases treated of people who had been subjected to the soda ash. Now, if we refer to that and go back 16 whole years from 1920 to 1925 there were several but how many they cannot recall. And then Dr. Smyth's testimony that anything that is irritating to the skin is irritating to the lung. Does your Honor want any more knowledge that can be imputed to the defendant company than that?

The Court: Yes, I want a great deal more, and what is worse, the Court of Appeals will want a great deal more.

Mr. Rudner: Your Honor, as regards the rule in federal cases I refer your Honor to Equitable Lefe Assur. Soc. vs. Johnson 81 Fed. (2d) 543 (reading):

"Federal Judge may not submit case to jury upon scintilla of evidence, but on motion for directed verdice must determine whether there is any substantial evidence upon which jury may properly return verdict."

Mr. Turtur: The scintilla rules does not apply in this court.

[fol. 1155a] Mr. Rudner: It does apply.

Mr. Turtur: It is the weight of evidence that counts, your honor please.

The Court: You are wrong, Mr. Trutur.

Mr. Turtur: Well, is your Honor going to apply the law [fol. 1156] of New Jersey to these cases or the federal law?

The Court: The scintilla rule applies to the federal court, Mr. Turtur. You will please allow me to instruct you on that point.

Mr. Turtur: I realize your Honor is a greater teacher than I could ever learn in the field of federal law or any law, but I just stated to you that where the only question——

The Court: The scintilla rule applies, Mr. Turtur.

Mr. Turtur: But I respectfully state, your Honor, that that is not the law of the State of New Jersey and the law of the State of New Jersey is what I respectfully urge——

The Court: Gentlemen, I will excuse you for 15 minutes.

(The jury was excused at this point.)

Mr. Rudner: Your Honor please——

Mr. Turtur: May I say to your Honor——

Mr. Rudner: The very fact that during all these years there has been no injury to the respiratory organs or the lungs is conclusive proof that these gentlemen, the officers of the company, could say that the inhalation of these dusts could not have caused these injuries. We bring to your [fol. 1157] Honor men at the source of the soda ash, who give you their experiences. Dr. Chaffe testifies that for a period of 35 years, while he has been at that plant, he absolutely never heard of an incident not only to the lungs but all the respiratory organs, the nostrils and throat. Now, there is no better proof of no knowledge than the fact that with their experience with respect to these dusts there couldn't be any injuries. The fact that during the summer months men might get rashes around the wrists and it passed away, and it being established, at least in Mr. Matey's case, that whatever he complained of he had under the arms, is definitely, conclusively attributable to some other thing. There is no knowledge or suggestion of knowledge or suggestion of notice. The fact that Dr. Smyth testified that it might cause,—something that affected the skin might affect the lungs,—he wasn't working in connection with company affairs, he just gave his opinion with respect to this case. He is not an employee of the company. Whatever he knows is certainly not chargeable to the company.

Mr. Turtur: May it please your Honor, Mr. Rudner [fol. 1158] states to the court that they bring Dr. Chaffe from the source of this soda ash——

The Court: Well, Mr. Turtur, you have given me one case which is manifestly against you.

Mr. Turtur: May I show to your Honor the case of Downing vs. Oxweld, 112 Law, page 25. May I state to your Honor that a memorandum opinion has been handed down by the Court of Appeals sustained that decision.

The Court: This seems to rather take away from the authority of this case. "It is conceded that these are poisonous and extremely harmful gases." No such concession here.

Mr. Turtur: Will your Honor read on, please, as to the question of negligence, your Honor please?

The Court: Well, the point is not negligence, the point is knowledge.

Mr. Turtur: Well, your Honor please, the question of knowledge would have to be der*vi*ed from this course. Now where was this source, the original place where they say they get it from.

The Court: I don't want your argument, Counsel. I think I am as capable of estimating the logic of the situation as you are. I want cases.

[fol. 1159] Mr. Turtur: All right. I say to your Honor——

The Court: Those two, one case is against you, the second case is not in point.

Mr. Turtur: Well, your Honor please, I am sorry to be so persistent to you, please. Now, if you will only read that first case that I gave to your Honor in full, that is the one that was handed down only a few weeks ago by Judge Wolfskiel, the case I gave you, the Oxweld, was what would a reasonably prudent person do under similar circumstances? What were the circumstances in this case? Here they had knowledge, your Honor please, and treated these skin rashes and skin diseases for years gone by. Now, at the Solvay Process, your Honor please, they had fans, exhaust fans.

The Court: I asked for cases. Have you got any more cases?

Mr. Turtur: Well, your Honor has instructed me quite definitely that you don't want me to read from memorandums but I have a lot of citations.

The Court: I will get them.

[fol. 1160] Mr. Turtur: I have the case of Textile Leather Corporation vs. The Great American, 108 N. J. Law, page 121. There are some cases cited in that Oxweld case that will help your Honor a lot. I have the case of Laporte vs. U. S. Radium. That is on the question of limitations, of course. I have the case of Davis vs. N. J. Zinc Company. There the defendant was charged with failure to use reasonable care to provide the plaintiff with reasonably safe conditions under which to perform his work and failure to give him warning of dangerous conditions claimed to be latent in their nature. The defendant was in the business of crushing metals.

The Court: What is the citation?

Mr. Turtur: 116 N. J. Law page 102, decided January 31, 1936. I have some more too if you want them. You don't want me to read from the memorandum.

The Court: I will get all the cases.

Mr. Turtur: Do you want me to keep reading the memorandum, your Honor? May I make this statement, please: Here is a case, in the Oxweld case, the first time that was ever tried in 75 years. Mr. Rudner brings you the argument [fol. 1161] along the lines that never was there another case like it. If that had been the case, then our law would not have grown as it has so grown, because there must always be a first time to everything. The mere fact, your Honor please, that nobody——

The Court: Really, Counsel——

Mr. Turtur: Sir?

The Court: Really——

Mr. Rudner: The fact has occurred to me, your Honor, that every single doctor for the plaintiff and for the defendant, including Dr. Gettler, testified that never have they heard or read of a case of a lung injury or injury to respiratory organs arising from the inhalation of soda ash. That, after the tremendous investigations going on over the last 15 years, all the literature of the United States Public Health Department and the various states, not a single doctor—the plaintiff is not able to present a single case of an injury of this type, yet the- say "You should have known."

Mr. Turtur: That makes no difference; if there are no reported cases on it, how can we give them to your Honor?

[fol. 1162] The Court: What is this case supposed to hold?

Mr. Turtur: I gave you another one, 116 N. J. Law 102.

The Court: Just note for the record counsel's case, Textile Leather vs. Great American, has something to do with the date at which a compensation should be figured and nothing whatever to do with the point on which he cited it.

Mr. Turtur: That is a case, your Honor please, that goes further; it goes further into disability from occupational disease.

The Court: It is a case of occupational disease concededly, has nothing to do with the knowledge of the defendant.

Mr. Turtur: Will you please get 116 Law 102?

The Court: We haven't it.

Mr. Turtur: All right. As long as it is not in a bound volume, your Honor please, but here is what it says: "Defendant was charged with failure to use reasonable care to provide plaintiff with reasonably safe conditions in which to perform his work and failure to give him warning of dangerous conditions which were claimed to be latent in [fol. 1163] their nature. Defendant was in the business of cru*chs*ing minerals. Plaintiff was employed in the packing room. 'The proof showed that this room was pervaded by manganese dust, alleged to be poisonous in its nature."

Is that the one that I gave your Honor, decided by Judge Wolfskiel?

The Court: Yes.

Mr. Turtur: "The evidence indicated that the defendant was chargeable——"

The Court: I have read that case and it has nothing to do with it.

Mr. Turtur: What did I give you?

The Court: The manganese case.

Mr. Turtur: The New Jersey Zinc. Don't you apply that same rule as to the negligence, your Honor*e* please? Your Honor's question to me is what knowledge did the company have? Is that i*s*, so that I don't burden you, please?

The Court: There isn't a thread of evidence as I have seen that the company had any knowledge that sodium carbonate was injurious to the lungs.

[fol. 1164] Mr. Turtur: My dear Judge, may I——

The Court: Please don't address me as My dear Judge.

Mr. Turtur: That is by way of emphasis, if your Honor please.

The Court: Really, I don't think I ever sat through such two weeks as you have given me.

Mr. Turtur: Onely I, your Honor? May I say this, please: You say what evidence is there that this man was going to get this disease of the lung, abscess? Now we told you and we proved to the court, I think, in no unmistakable fashion, that here is a case where we bring the world's foremost authority in the field of chemistry and toxicology and they told you, your Honor please, that anything that is irritating to the skin is irritating to the lungs. Professor Smyth, their own witness, says that anything that is irritating to the skin is irritating to the lungs. Dr. Runnells says that anything that is irritating to the skin is irritating to the lungs. Dr. Cluckman says the same thing. Dr. Pollak says the same thing. And with that in mind, your Honor please, how can a man, how can this factory say that "We did not have any knowledge that this man would have suf-[fol. 1165] fered this condition" when they of their own doings, have had this continued kind of manufacture for ever so many years without giving proper protection to their men, and why do they have knowledge? They have knowledge by the superintendent, the personnel man, who gets on the stand *the* says that from 1920 to 1925, "we had some of these cases in so far as the skin rash is concerned" and then from 1925 on they have had some more, and in the last five years they have had some more, your Honor please. Now, the mere fact that nobody has sued them before with a bronchiectasis or with a lung abscess does not mean that they didn't have knowledge, your Honor please; they certainly must have had this knowledge and if they had the knowledge that this was bad for the skin, then any resulting consequence that is bad to the skin and maybe bad to the lung is their look-out because they are not using any ventilators, they are not using any respirators.

The Court: Please don't argue the case or sum up to me.

Mr. Turtur: But I am trying to show your Honor my contention and my logic of the thing from the legal point of [fol. 1166] view. I say that they have knowledge, I say that they have had abundance of knowledge, and so much so, your Honor please, that by their own evidence it is impossible to even conceive that they didn't have any knowledge. That is my contention, your Honor please. I think we have given your Honor everything that calls solely, purely, and strictly for a jury question. We have given you the condition of the plant. They have admitted that they use no respirators. They have admitted that they use no fans.

The Court: You are still arguing the case over again. Now, the fact is that the only knowledge they had—in the first place, your come into court with a theory that your own expert cannot support when any investigation is made of it. Then secondly the only knowledge that they had is that this sodium carbonate material, an alkali, not as you tried to pretend a poisonous and corrosive alkali, as irritating to the skin. Now, for that I am very doubtful that there is any deduction that it will cause lung abscess.

Mr. Turtur: But the experts stated so, your Honor.

[fol. 1167] The Court: That there was any knowledge that it would cause lung abscess? We are not arguing now the question of causation, we are arguing the question of whether these people should have known. If next week they have a lung abscess they cannot contend that they didn't know.

Mr. Turtur: May I respectfully state this to the court: If a person gets a scratch upon his hand can he reasonably presume that within five days or ten days thereafter he is going to die from that, merely from a scratch, if that scratch becomes infected and it becomes so infected as to produce death. Now, these people should have known, these people should have had sufficient knowledge.

The Court: Your saying so doesn't carry any weight.

Mr. Turtur: Well, it is not me that is saying so, it is their professors, their experts that say so, that anything that is bad for the skin is bad for the lungs, and they have had this condition for years and years, it isn't only one isolated case; even their own people, if I may say, your Honor please, at the source of the manufacture of this soda ash, they use [fol. 1168] respirators when used in large quantity and they use fans and exhausts. Why are they using fans and exhausts? Why are they using respirators, if it wasn't for some purpose of irritation? Dr. Chaffe says that it is irritating when you come in contact with a large amount of it.

Mr. Rudner: Your Honor please——

Mr. Turtur: Now, the jury, your Honor please, in this case went and made an inspection.

The Court: Now, please don't go into that.

Mr. Turtur: No, I won't go into that, all right.

The Court: You have cited me no cases that are anywhere nearly in point. I am satisfied that the Court of Appeals will never allow a verdict to stand.

Mr. Turtur: I am willing to take that chance, your Honor please.

The Court: Not only has there been no evidence of any knowledge but I say the proofs in this case from plaintiff's own witnesses, that the men who have worked there for years, have never had a lung injury, is conclusive.

Mr. Turtur: Why, Laskoti was the man who says he was subjected to that thing, Laskoti himself.

[fol. 1169] The Court: What did he get?

Mr. Turtur: Laskoti got this skin condition and then said he had pains in the chest.

The Court: He said he had a stomach ache.

Mr. Turtur: He said that and the record will prove it—stomach condition and indicated up here around the chest, Laskoti himself, besides the people that they admit got skin rashes. Now, when these people got the skin rash then they are reasonably suppoesed to anticipate that any condition that will be bad for the skin may be bad for the other organs and should provide a safe and reasonable place where these men should work.

The Court: Note again the record Counsel is shouting.

Mr. Turtur: Well, I don't mean to be disrespectful by doing, that your Honor please, I am sorry, I want to apologize, if you think that is so. I merely want to make my point, your Honor please. And I say that they have had sufficient notice and knowledge and it goes back for years. That Downing case, as I said, it is the first time that a case of that kind was tried in 75 years yet the Court of Errors and App-als sustained that contention.

[fol. 1170] The Court: What contention?

Mr. Turtur: The contention as held in the Downing case.

The Court: That has nothing, concededly. I read it to you. Counsel, it is so hard——

Mr. Turtur: Well, that is the first time that a case like that was ever tried, your Honor.

The Court: Concededly poisonous substance.

Mr. Turtur: Well, but they conceded that it is an inorganic substance. Mr. Davis nodded so the other day and

Mr. Rudner conceded that it is an inorganic substance and the books and the testimony showed that when they come in contact with inorganic substances which are al*ak*line in nature and quality that it is injurious to the mucous membrane.

Mr. Rudner: Your Honor please, those medical books do not suggest, however, the degree of the alkalinity which is required. They may have reference to sodium hydroxid.

Mr. Turtur: Why, your Honor brought in an expert, Dr. Wiener, who in the original testimony—Dr. Wiener and also Mr. Davis both stated that the sodium carbonate when [fol. 1171] added with water remained sodium carbonate and does not hydrolyze to sodium hydroxid, which means the hydroxyl ions. Now, Mr. Wiener brings in a book that states that sodium carbonate has hydroxyl ions when placed in water and when compared with sodium hydroxyl solution the amount of hydroxyl ions were as one to four, I believe your Honor stated. Doesn't that show that it is so? They have chemists in there for years and years who know what the contents of this substance is. They should know what the resulting condition would be to this mucous membrane and to these people that work about this place. If they didn't properly analyze it or if they didn't properly apply it or if they didn't conceive that this might be of some harm to the mucous membrane and to the lungs, it is not our fault but they do say that they had knowledge of this condition which was corrosive and which was irritating in effect to the skin.

The Court: I am going to let this case go to the jury because we have been here so long, but I am telling your, Counsel, that my view of the matter is that any verdict they may bring in will have to be set aside by me.

[fol. 1172] Mr. Rudner: Of course, if that is the case, your Honor, I think there ought to be a directed verdict even though the case has gone so long.

The Court: My practice is generally to follow the one I have indicated and then if I have the record I may be better able to examine it.

Mr. Rudner: Now I have some other reasons, your Honor please. The testimony——

Mr. Turtur: Did your Honor say anything to me?

The Court: No, I didn't say anything.

Mr. Rudner: This goes back to the matter of proximate causation. The testimony is, even Dr. Runnels, that an individual inhales a substance of irritating nature, it has a bilateral effect on both sides of the lungs. In this case there is no suggestion or proof that the lungs on the other side are affected in any manner whatsoever, that whatever fibrosis this man has is the natural condition of fibrosis which we all have. In other words, we are not dealing with a condition of infiltration, which is affecting the side of the lung not claimed to have been injured, in other words. [fol. 1173] That being the case, the case must fall of its own weight because there is not that original irritation which must come about bilaterally both sides of the lungs before anybody can suffer an injury from the inhalation of dust, and Dr. Runnells this morning admitted that, and Dr. Runnells and all our doctors say this, that before you can get an irritation of the lungs, the nose, the mouth and the mucous membrane and other parts leading to the throat and lung must have been affected, and in this case there is no suggestion, not even an imaginary suggestion, that this breathing apparatus has in any wise been touched or irritated by the inhalation of these dusts. Dr. Runnells suggests that the mere fact that this man said he coughed means only that in the bronchial tube leading to the chest, the lungs, there has been irritation; he does not indicate that in the mucous membrane of the nostrils or the throat there has been any irritation, and with that preliminary not eliminated, with the preliminarily important thing being absent from the case, sir, this case cannot go to the jury on the element of proximate causation.

[fol. 1174] Now, another thing we have the proof from all the doctors that whether we take bronchiectasis or abscess, there are several causes which might bring it about and our doctors, Dr. Fine particularly, and I think Dr. McCallion too, have given the unquestionable reason for this man's condition of health, particularly remembering that in October, 1923, he had a normal chest expansion no rales and good healthy condition; that he went into the hospital in June, 1934, with a good health condition and was examined by this young Dr. Novello who was a fine appearing young man,—I never saw him before,—he testified very impressively, and undoubtedly knew what he was talking about, and it was twenty days after the operation that this breakdown came about from the use of a general anesthesia, and Dr. Fine does say that came about when he started walking about. Now, in addition I say, sir, on the law of assumption of risk, we should have a directed verdict; if we assume these conditions, these factory conditions——

The Court: By the same token there is nothing to that because if you say there is no knowledge on the part of [fol. 1175] the company of deleterious character of the dust, by the same token the plaintiff could not have known. So that is silly.

Mr. Rudner: I suggest that on the matter of assumption of risk there is also ground for a directed verdict. Now, on the statute of limitations——

The Court: Don't argue that.

Mr. Rudner: Your Honor, on the statute of limitations, it is our con-ention that after 1932 this man never worked in the silicate department.

The Court: Of course, I think it is very questionable if there is any evidence to sustain a verdict of subjection in the phosphate department.

Mr. Rudner: I just want to read you this one statement from Mr. Matey's own testimony on page 50. Question by Mr. Turtur: "Did you take samples from every place where you worked?" "No, I didn't take no samples from the phosphate because I didn't get sick on the phosphate." "You didn't take any phosphate?" "No."

Mr. Turtur: What page is that?

Mr. Rudner: That is Mr. Matey's testimony.

[fol. 1176] The Court: Yes, I remember. I think it is very questionable there too.

Mr. Turtur: What page was that, Mr. Rudner?

The Clerk: 94.

Mr. Rudner: Now, the testimony is overwhelming that this man was not subjected while he was in the phosphate department to any of this dust; he was four days outside, with occasional visits inside on wet presses and one day a week inside and then still wet presses.

The Court: Mr. Rudner; I want to have the record before me to examine it with care. I don't think the case has been well tried and I want to see the record and examine the law carefully. I am very doubtful that plaintiff could possibly sustain a verdict in the Court of Appeals on either knowledge or having suffered from the negligence of the company in the phosphate department. And I am further of the opinion that the plaintiff's doctor's theory is all wrong, that if they brought it on the bronchiectasis theory they might have had a much better chance, and of course there can be very little excuse, it seems to me, for that sodium hydroxid performance.

[fol. 1177] Mr. Rudner: We were fair in this case, your Honor, we didn't minimize this man's injuries, we gave,—our doctors at least, what they felt was an honest expression of opinion.

The Court: Well, if you want my social expression, I think this plant should have put in a better ventilation system and I think the fact that they have this suit and will probably have a lot of other suits will result that way but they haven't.

Mr. Rudner: If your Honor feels as your Honor does about the evidence with respect to the various matters I have raised, I think, sir, that the verdict should be directed.

The Court: I want to examine it carefully and look up the law for myself; as that will only necessitate another hour that will be the course.

Mr. Rudner: Your Honor will direct a verdict later on?

The Court: I am telling counsel for the plaintiff his case is probably so weak legally speaking that it will probably——

Mr. Rudner: Then is my motion denied?

[fol. 1178] The Court: Denied: I give you an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

The Court: I will also advise counsel that I am going to take down their summings up so be careful to keep them within the limits of the evidence.

(Proceedings resumed in the presence of the jury.)

The Court: Have you any requests, Mr. Turtur?

Mr. Turtur: Yes, your Honor.

The Court: How long do you want, Counsel?

Mr. Rudner: How long will your Honor allow for summing up?

The Court: I would like to charge them not later than ten minutes after four. Is an hour enough, a half hour each?

Mr. Rudner: Yes.

[fol. 1179] SUMMATION FOR DEFENDANT

Defendant's counsel summed up as follows:

If your Honor please and gentlemen of the jury: I appreciate, gentlemen, beyond measure, your kind patience in this trying case. It has been hard on us, working day and night, and at times if we have been irritable and nervous, please forgive us, because it is one of the incidents of the trial of a case, these exchanges that have taken place, which all arise from the zeal of trying the case. Lawyers, you know, die young; it is not because we are bad, it is because of the terrific strain. Please forgive us; it is all in the process of being zealous in representing our respective clients.

Now, gentlemen, you have heard a lot of testimony in this case about dust, a lot of dust. You have heard the plaintiff's testimony; you have heard these men; you have heard the defendant's testimony; you have heard the men testify with respect to dust in the silicate department and dust in the phosphate department. You gentlemen were afforded an inspection of the premises in the silicate department and in the phosphate department.

When this suit was started, gentlemen, the complaint [fol. 1180] alleged only negligence or charged this dust condition in the silicate department. Actions at law are started by a complaint. You file a written complaint which sets forth the facts, and I am not giving you a trade secret or secret of the profession when I tell you that when a lawyer prepares his complaint he puts his best foot forward; in other words this case was handed to us originally as being a charge in the connection with the silicate department. During the course of the trial counsel sought to amend the complaint by adding the phosphate department; and that is particularly interesting, because, gentlemen, if you read Mr. Matey's testimony which was taken—I will just read this one page 59,—I want you to bear it in mind:

"Mr. Turtur:

"Q. Did you take samples from every place where you worked?

"A. No, I didn't take any samples from the phosphate because I didn't get sick in the phosphate."

That will be important later on. I am not going to say to you gentlemen,—I am not going to minimize Mr. Matey's injuries. I am not going to say to you Mr. Matey is not sick; [fol. 1181] he is sick; we have had our doctors, eminent specialists in lung diseases, examine this man; they say he has bronchiectasis, and as Dr. Pollak said "I would rather have an abscess than bronchiectasis." We have not come into court to minimize this man's injuries; he is a sick man. But when they seek to charge us, sirs, with this man's condition, I must stand before you with all the vehemence I possess and tell you as I told you when I opened, that what this man is suffering from is something that I might suffer from as a lawyer or anybody outdoors might do. If Mr. Matey had been a gardener, if Mr. Matey had been a street car conductor or anything under the circumstances of this case,—after that operation he got an unfortunate break; as Dr. Fine put it; he "shot an embolism." It struck him in the lung, didn't go through and brought on that condition.

Now, gentlemen, I am only going to give you the implications of a suggestion that if the dust conditions were as terrible as plaintiff's witnesses say they were, the plaintiff's witnesses tell us, tell you gentlemen, that the room was full of dust; it was so affected that on foggy days you couldn't [fol. 1182] see a man working next to you; that it fell down so high that it was up to your knees, wheelbarrows full; that the conveyors, welded iron, were full of holes and these things happened. Our men, of course, deny such conditions of negligence in the normal operation of this plant; and I am saying to you this, gentlemen: that the implications of the testimony of the plaintiff that such a condition existed are these: that in the State of New Jersey where we have one of the most modern Labor Departments in the country, an industrial state which was an industrial state when there never was a middle west and a west—in the State of New Jersey where the potteries originated, including the City of Trenton which was at one time the greatest pottery center in the world, that in a state which has had more progress, more development in the inspection of industrial plants, a factory existed in the Grasselli where this condition of dust existed; where a plant, regularly inspected by inspectors who walk through the plant when they please, not according to dates, who examined this plant during the time Mr. Matey worked there and never found a violation with respect to ventilation or dust conditions and so reported to the Labor Department.

[fol. 1183] Now, you gentlemen went down to the plant, and as it happened while you were on the platform you saw this discharge. Now, that has been explained to you gentlemen, and I say to you this in honesty, frank honesty, if you gentlemen are going to take that single instance, it happened a couple of times in four or five minutes,—I was there,—if you gentlemen, you twelve men, are going to hold that single incident against us and decide this case with respect to that one incident, then I say to you gentlemen you are doing us a great injustice, not consciously,—I understand, I was there, I saw the spouting of the sand, this dust, but the witnesses tell you how that happens and how it came about. Mr. High has worked in that plant for years and years and says that in all the time he was there he never saw it, although he is not engaged in the operations. Mr. Davis told you about it and these other men. There is no showing that Mr. Matey was there all the time; Mr. Matey had twenty-five per cent of his day in the aggregate of eight hours that he would have been on that platform and there is no suggestion that at the particular time, any particular time he might have been there when this thing happened. You gentlemen will recall [fol. 1184] that immediately in back of this platform there are two windows. You can very readily take out dust—I will get them for,—it is somewhere around here. Directly in back of that platform there are two windows, pivoted if you gentlemen will remember, at the time of the inspection you made. Those windows take out that dust very rapidly. Now, I only say this to you: the condition Mr. Matey says with respect to the dust couldn't have happened and doesn't exist in any factory in this state, one of the most modern industrial states in the United States.

Dr. Smyth Sr. tells you that he is adviser to the Labor Department of the State of New Jersey and to the Labor Department of Pennsylvania, and he is one of the outstanding experts on dust conditions in industrial plants in this part of the country. In other words our Labor Department being a perfectly equipped and manned department, would not have permitted such a situation to exist in this case.

Plaintiff came into court, gentlemen, on this theory through Dr. Gettler, and you will probably be told he is the greatest man in the world—well, we will judge about [fol. 1185] that—and Dr. Gettler came here with his first testimony and said this: take soda ash dust, submit it to water; it goes through the process of hydrolysis, that is the work, hydrolization, hydrolysis, and ends up in sodium hydroxide, a very bad caustic; that the application of this sodium hydroxide to lung tissue, post mortem—he didn't qualify as an expert on inhalation,—will have a corrosive effect, irritation and cause these things. It wasn't until Mr. Davis got on the stand and mentioned the word ionization that you gentlemen were apprised of the fact that a different process comes about, and that the net, that is the ultimate result is not sodium hydroxide but a material, caustic powder or whatever it may be. And Dr. Gettler never went back to the stand to testify as to what would be the effect of that new product, this low grade product having gone through the process of ionization, upon the lung tissue. All that he tells you was that sodium hydroxide, if applies to lung tissue will have this effect. But on the second day, when he came back and Dr. Wiener, the independent man came in, and said sodium carbonate, applied to water, is still soda ash, you can apply all the water you want, the final result is still soda ash,—when he heard that he says it goes through a process of electrification, [fol. 1186] ionization, and forms this metal caustic; but Dr. Gettler never went back to the stand to tell you gentlemen what the effect of this new business, this new type of caustic which was formed, would be upon the lung tissue. He was battling for his position of causticity; he was forced to take back the sodium hydroxide theory and all he presented to you gentlemen was a theory. You are being asked to decide this case, not on the facts, but upon a vague theory and that element didn't develop until Dr. Chaffe came here, a man of thirty-five years experience at the Solvay Process Company where they actually manufacture the soda ash. In his thirty-five years of experience where he comes in contact with all the men, he has never heard of a case of a lung injury or an injury to the respiratory organs from the inhalation of soda ash dust.

Now you have Mr. Davis, who made an interesting test, gentlemen, the test of putting the soda ash in water, putting that in some other liquid, having it turn red and blowing into it, showing that the carbon in our chest, in our system is sufficient to neutralize whatever little element of causticity may be in that water and eliminate the caustic [fol. 1187] effect; so that if that carbon dioxide in our lung will cause that effect, it must neutralize whatever we inhale, that light caustic, if we do inhale it, if it is caustic, it cannot cause this. You saw those tests made.

Now gentlemen, there are very significant facts in this case, that is, if you charge the company with negligence, one of the essential elements one of the ingredients is knowledge. Do you know that under certain circumstances certain things will bring about injuries? You and I know if we drive a car sixty miles an hour, we can do harm on the highways. You and I know if we turn corners fast,—we know it by experience. But where is the knowledge of anybody in the Grasselli Chemical Company to the effect that if we assume this irritating effect, that it will affect the lungs? Oh, you are going to be told this, gentlemen: that it will cause rash on the hands, and caused rash on the hands, which we admit, in the summer time because of the movement of the sleeves. They are going to tell you that because that happens the company should have known it will affect the lungs. Mr. High who has been there since 1920 in charge of all these matters, has never heard of a case and has had no case in Grasselli in the silicate [fol. 1188] department or any other department where these dusts are inhaled, which have ever brought on any injuries to the respiratory organs.

May I say this at this point, gentlemen: plaintiff rests only on three powders. He says only three of these chemicals cause any damage, soda ash, phosphate of soda and metasilicate. He doesn't say that any other chemical in this plant, whether it is powder or whether it came from a furnace or whether it is gas or anything—frankly he says that it has nothing to do with this man's condition. You have to start with that premise, gentlemen, that no other thing this man was working with, no other thing about this plant caused this man's injury, because plaintiff doesn't say anything about that; he says only this: that the things which brought about this man's injury were these three powders, soda ash, phosphate of soda and metasilicate. As regards the other things he gives us a complete and clear bill of health; so you must disregard every other thing, because we don't guess in the law. It is the duty of the plaintiff to prove that the defendant was negligent and that the negligence as charged was the proximate and immediate [fol. 1189] and direct cause of the injuries which are claimed in this case. And in the law, gentlemen, we don't speculate; we don't deal in the element of conjecture. The law is more of an exact science; the law says you must prove, not that it might happen, but it actually did happen and where we have a situation of several possibilities, of several things being the probably cause, you cannot say, "Well, I will pick one out to hold you on." No, because our law is specific; it says to the plaintiff, "You must prove that this particular thing as charged brought about these injuries." That is why we deal with the element of proximate causation. Was this as charged the proximate cause of this man's injury? And that becomes important because of what these doctors say with respect to what happened.

Now, Dr. Tarrant examined this man on October 23, 1933 in connection with when he left; and you saw Dr. Tarrant; he gave him a head to foot examination, stripped, which lasted between forty minutes and an hour; and he found absolutely nothing wrong with this man. His chest condition good; no rales in the lung; no temperature; nothing. And weight—and mark you this: the weight of the time [fol. 1190] that Mr. Matey came to this company was 137 pounds—135 pounds; that the weight at the time Dr. Tarrant examined him in 1933 was 131.

Mr. Geuther: 130¾.

Mr. Rudner: Something like that, although Mr. Matey says he was constantly *and* losing weight from 1930 to 1933. We brought to you the young lady who took his original weight back in 1928, who says his weight was 135, and from 1928 to 1933, five years, there was a loss of weight of less than five pounds; yet he was losing weight constantly and constantly, all that sort of thing. He was coughing; we have no evidence of a cough. Now, this man had an itch under the arms, around the groin, &c. which was charged to us. Oh, yes, they charge a carbuncle irritation. Well, now, gentlemen, let's be fair about it. I have had carbuncles; I guess many of you men have had carbuncles. We know how those come on, irritation from a collar can bring it on; but it never came from soda ash. He had to have it taken out. But he did develop rash which at the time was suspected to be due to occupation; they played fair with the man; gave him compensation. Later on it was investigated and they sent him to Dr. Oleynick who, I understand, gentlemen, is an outstanding skin man around [fol. 1191] this section, a man who has specialized in skin.

ailments, a thorough man in that particular question. And, gentlemen, you have heard the word dermatitis. Dermatitis means only—anything that happens to the skin is dermatitis, because derma means skin. Anything—you have a group of pimples on the hand or the body, that is dermatitis. It is no disease. Anything that affects the skin is dermatitis. Dr. Oleynick treated this man, did the best he could and finally submitted some tests to this company, found them absolutely negative. He later on subjected him to test, found a fungus growth. This company did this: it sent Mr. Matey to a specialist for the purpose of curing him of this itch. They did the best they could; did it in good faith as one of its employees.

Then we have in March 1934—now remember in October 1933 we have Mr. Matey examined by Dr. Tarrant with a clean bill of health physically although Mr. Matey testified that commencing in the early part of 1931 he commenced coughing and commenced losing weight, plains in the right chest and rear chest. 1931—his examination made in October, 1933—three inch chest expansion found, which the doctors say indicates no involvements in the lung but a normal [fol. 1192] lung; and Dr. Runnells this morning admitted that fact—in March 1934 Dr. Kessler comes in in connection with his wrist. He goes to Dr. Kessler about his wrist. The only complaints he made are the wrist, March, 1934.

Gentlemen, this man is no longer in the employ of the company. June 14, 1934 he goes to the Alexian Brothers Hospital for an operation for a hernia. There he is examined by Dr. Novellow whom you saw who I consider is a fine able young physician. He spoke to you frankly, right in his own handwriting the history as presented by Mr. Matey and he found it clear, so clear as to lungs and everything else that an operation was performed upon this gentleman by Dr. McCallion with a general anaesthesia; and Dr. McCallion said "If that man had a chest condition I would never have given him ether"; and there isn't a doctor who has testified in this case that ether is good for the lungs of a man that has difficulty—it is ruinous, ruinous. He was in the hospital 17 days; with proper care he came out in 17 days, later went back. Now, I say, gentlemen, that established unequivocally and without doubt that in 1934 this man had a clear chest, no involvement except a fibrosis which I may have and which you gentlemen have, we all have fibrosis, 90 per cent of us. He went in there and [fol. 1193] something happened after that operation as Dr. Fine explained to you and this unfortunate thing happened. Now, our doctors tell you this: If you have inhalation of irritating substances, they affect the nostrils first; they must affect the nostrils; they affect the eyes, affect the throat and affect the lungs evenly; but unless there is obstruction on one side Dr. Runnells testified it will go in the lungs evenly, show signs on both lungs, which will appear in the X-ray rather, and you cannot miss it. These X-rays are free of all fibrosis excepting the normal fibrosis to which we are all subject. In other words, this man never inhaled any irritating substance which did damage to this man's lung. That is confirmed by Dr. Smyth, Dr. Fine, Dr. Pollak, that it must be bi-lateral and affect both sides, that it absolutely cannot affect one side and not the other; if it is irritating that it must affect both sides and the conclusion is inescapable that having not affected both sides this man did not inhale any irritating substances which caused his injury, that this man has a condition resulting from natural circumstances which would have affected Matey had he been a clerk in a store or anything else. What effect—and that comes down to knowledge [fol. 1194] again—did this company know? These men have chemists. Never in the history of this plant, as far as we know, as testified to by these people, never in the history as testified by Dr. Chaffe and Mr. Heard, never has the Solvay Company ever had a case of respiratory injury by inhalation.

Now, let me say this: all the doctors testified, Dr. Runnells, Dr. Gluckman, all our doctors too, that if you have no inflammation of the nostrils, mouth and throat, that is an indication that there was no inhalation of any irritating substance. The fact that, if we assume that Mr. Matey coughed during this period, that may be that he had some irritation in the bronchial tubes, but he couldn't have inhaled any irritating substance which would have affected the bronchial tubes unless there was a similar infections in the nostrils and the throat; and the absence of any effect in that particular part destroys absolutely any suggestion that this man inhaled anything which caused him any injury.

Now, I said to you in my opening, gentlemen, that we are not going to say this plant had no dust; there isn't a plant anywhere in the State of New Jersey that doesn't [fol. 1195] have dust. The law doesn't say you must keep your plant dust-proof. You cannot do it. This room is full of dust; our homes are full of dust. The law says only this; you are allowed to have dust but you shouldn't have more dust than should be there under reasonable circumstances.

Now, another thing which is of great importance in this case, gentlemen, which makes me read again what Mr. Matey said with respect to the phosphate department: "I didn't take any samples in the phosphate department, because I didn't get sick in the phosphate department." If you gentlemen find that the dust conditions in the phosphate department were entirely proper and if you find that Mr. Matey was not subjected to dust in the phosphate department, as you absolutely must, even though you may find that in the silicate department there were these dust conditions, you must find for the defendant and the court will so charge you. If the dust in the phosphate department were entirely proper, if this man did not handle any phosphate of soda, soda ash or metasilicate in the phosphate,—he couldn't have handled it in the phosphate because they didn't use it there—you must bring in a verdict for the defendant. There is no choice for the action with respect [fol. 1196] to the silicate department is barred by the statute of limitations; that is unquestionably the law that will be presented to you by the court and I ask you, gentlemen, to give that particular consideration, because George Matey worked four days outside—and you cannot ventilate outdoors—with rocks and he worked one day inside in and about the wet vats that you gentlemen saw and there could not have been any dust; and under those circumstances, gentlemen, having regard to what he said here in his own statement that if he did get sick, he certainly did not get sick there, I ask you gentlemen to bear in mind these two things, the silicate department and the phosphate department. If you should find with respect to the silicate department there were dust conditions, that of course is a question of fact which you gentlemen must decide,—I cannot decide that; and if you find with respect to the phosphate department a proper condition of dust you still must find for the defendant a verdict of no cause of action.

Now, gentlemen, this whole case is presented to you on a theory. If in the processes of the law we have got to the point of a mere theory, a barren theory unsustained being able to give a plaintiff a verdict, then we have reached an unfortunate situation. Every doctor in this case, every [fol. 1197] doctor for the plaintiff, every doctor for the defendant including the great Dr. Gettler for the plaintiff, will tell you distinctly that they never heard of anyone being injured in phosphate of soda or any of these dusts, never read about it, never heard about it; and with all the tremendous literature being written and floating around this country from all sides about this thing, they never read, never heard of a case of injury from this particular type of dust. Now, they will say to you "Well, some doctor said it was inorganic dust." Now, inorganic dust is a wide classification and inorganic dust may include, and I suppose it does, sodium hydroxide; but dealing with the dust which we are charged with in this case, never in the known history of this country or anywhere else, as shown by medical men of greatness, has there ever been a case of a lung injury, an injury to the respiratory organs through the inhalation of this thing. And I say to you gentlemen that absolutely it couldn't. If the known medical science, if men of science and medicine in this world have never heard of it, how is the Grasselli Chemical Company going to know about it? That goes to the element of knowledge. If you don't know that a certain thing might happen the case must fall. I am not going to talk to you any more, gentle- [fol. 1198] men. You gentlemen have the facts fixed pretty well and I am saying to you this gentlemen: I am asking you to decide the case on the facts of this case, as presented to you. I am asking you to decide the case on the proofs of this case. And I say to you gentlemen that on the proofs and facts presented, there is only one verdict which is allowable to come in in this case and that is a verdict for the defendant. I know Mr. Matey is sick. That is unfortunate, but that is a starting point. That does not mean that we are responsible for it. I might get sick to-morrow at this minute with the same thing, I don't know; we all might. That is one of the risks of life, but don't please gentlemen, based upon the proofs, don't seek to tie it up with this defendant because he worked for Grasselli. Oh, it is easy to say he worked for Grasselli, he must have got it there. That is a non sequitur. Our law requires proof and I say, based upon the proofs in this case, it allows for only one verdict, a verdict for the defendant, and I ask you gentlemen, on those proofs to bring in a verdict for the defendant.

[fol. 1199] SUMMATION FOR PLAINTIFF

Mr. Turtur summed up on behalf of the plaintiff as follows:

May it please your honor, Mr. Foreman and gentlemen of the jury: At the outset permit me to state that I am exceedingly happy that I have had the honor of appearing before this court and this jury, especially in view of the fact that some of you gentlemen; of the jury understand these chemical analyses a lot more than I do. And after all, this was a battle of experts. Now, whom do we produce? You very ably listened to the testimony of many witnesses, Professor Gettler whom the court said was a world authority. He is the best in the field——

The Court: I am going to characterize Dr. Gettler's testimony. I said that before I heard—discovered what it was. I have a different view of it now.

Mr. Turtur: Well, your honor please, I am only stating what your honor stated when Dr. Gettler came here.

The Court: I say I think I am now better informed.

Mr. Turtur: And I am still willing to either fall or stand on what Professor Gettler says or does. Now, gentlemen of the jury, I want to read to you just a few excerpts from [fol. 1200] the testimony of Matey, page 49:

"How long did you work around this department where you were working sometimes outside and three days inside, I think you said.

"Three days outside and two days inside.

"Q. What did you do when you were inside?"

"Operator.

"What did you have to do as such operator?

"Wash the drums and pump the mud out and put on the dryer and dry them so they make blocks with it.

"What room was that in?

"That was in the Dorr plant, they call it the Dorr plant.

"That was not in the same department as the soda ash or silicate soda?

"There is a lot of soda ash because they taking liquid from me right at the tanks on my side and throw the soda ash in there with the liquid and that is what they make phosphate soda.

"Q. How long did you work at the operation three days outside and two days inside?

"From 1932, I don't remember what month they changes to 1933 until last of November.

"You worked until last of November in 1933?

"Yes.

[fol. 1201] "In what department?

"Phosphate of soda.

"What was the last time that you worked?

"In 1933?

"Yes.

"The latter part of November.

"The end of November?

"Yes.

Some more:

"What was the condition as to the dust, the department where you were working November 1933?

"It is all dust all the time the same.

"It was the same condition as existed all the time?

"The same when they worked.

"What kind of dust was that, from what department?

"Soda ash dust; and they got three kinds of stones in there and they grind them stones and that smoke comes up on the tanks when we were working.

"What department was the phosphate of soda?

"We call it the Dorr plant."

And he goes on.

Now, gentlemen of the jury, all I would like you to do is to compare the testimony of our respective witnesses and [fol. 1202] the witnesses of the defendants. You recall that in the opening of my learned adversary he stated to you that there was hardly any dust, that there was no dust to speak of in this plant. Well, we are very fortunate that the law does provide a medium by which the eyes of the jurors may see the very thing that is the subject matter of dispute, therefore the inspection by you gentlemen. The only witness that was the silent witness was furnace No. 3, when you gentlemen were there. The further witnesses that were very silent were the conditions that you people saw when you were at the plant. What that condition was far be it from me to describe to you gentlemen of the jury, because I know that you saw plenty of it when you were there.

Now, do you think that that wasn't negligence, in permitting a person to work under a condition of that sort which almost spells a hell-hole on earth? They talk about knowledge. Way back in 1920, gentlemen of the jury, Mr. High says that they started to treat cases of skin rashes. "From 1920 to 1925 how many cases did you treat? I don't recall. There were some? Yes, but I don't recall the number, from 1925 on; in the last five years there were some [fol. 1203] but I don't recall the number." And yet he has been in this court room every day, but the records are not produced. And why? And he doesn't recall and yet he is the one who has charge of that particular department.

Then the very silent other features of this case are all of their photographs. I didn't take those nor did I take any of these photographs and they want you to believe when these photographs are introduced that they were absolutely or almost free from dust. They produced them, gentlemen of the jury. I didn't. Inspect them. Look for yourselves.

Now, we bring in, not only Dr. Gettler; we bring in Dr. Runnells. We bring in Dr. Gluckman whom my learned adversary said he had a high regard for. Mr. Rudner said that Dr. Gluckman was a person of high standing and he had a high regard for him. Do you think that we are exaggerating? If we were exaggerating, gentlemen of the jury, we would have tried to bring Mr. Matey into this court room.

The Court: You did try, counsel, and I wouldn't let you, so that is not quite accurate.

Mr. Turtur: Well, I would have tried some more, your honor please. Your honor asked that I take the depositions when your honor heard the condition of Mr. Matey. Therefore Mr. Matey was not brought into the court room; we [fol. 1204] had to take the deposition at his bedside because of his condition.

Now, then, you compare Dr. Gettler, compare, if you please, Dr. Gluckman and Dr. Runnells to Dr. Pollak who took the attitude of a very famous lawyer, rather than the attitude of a very famous doctor; he volunteered more stuff than any man that was here. Then Dr. Fine, you noticed the anxiety of that man, the man that had flunked in chemistry, the man that has been specializing twenty three years and does not know—a specialist, and mind you, in the lung field—what is an organic or an inorganic substance. A fine specimen! Did you notice the conservative attitude, the demeanor of Dr. Runnells, the demeanor of Dr. Gluckman, the conservative attitude of all of the people, comparable to Mr. Davis? And I had this particular phrase looked up by Mrs. Bergen in which he said on direct examination by Mr. Rudner: "I have seen a mixture of soda ash in times past, but not in recent years—this refers to the belts—not in recent years on the belts, because it has a destructive effect." "But not in recent years because it has a destructive effect." Well, now, if it has a destructive effect upon the belting, the leather belting, what kind of an effect, a destructive effect, is it going to have upon the human system?

[fol. 1205] I won't take much longer, gentlemen of the jury, but I was so happy that Dr. Gettler was again here when the tests were being made in court where, if you will recall, they added barium chloride to counteract the alkalinity of this substance; but you must remember that when Mr. Matey worked in this department, whether in silicate or phosphate and he was subjected to this soda ash, the honorable Grasselli Company didn't hand him any barium chloride to apply to the lungs so as to neutralize whatever effect this soda ash was playing upon his mucous membrane and his system. Ether was not the only thing used at the operation over at the Alexian Brothers Hospital but also nitrous oxide; and what for? You heard the evidence. I will leave it to you.

The Solvay gentlemen who came here, they very frankly tell you that never in so many years have they heard of such a case, until Judge Clark asked the question, "Do they wear any respirators at your plant? Yes, they wear respirators where men come in contact with a volume of it. Do they have a ventilating system at the Solvay Process? Sure." Do they have a ventilating system in the Grasselli plant? No. Do they wear respirators at the Grasselli plant? [fol. 1206] No. Are they doing their duty towards their fellow men in working in departments of that sort? They tell you that these doctors have always stated that they never heard of any injury from soda ash or phosphate of soda or metasilicate. Well, gentlemen, why haven't they heard of any? They may not have heard the specific subject because perhaps no one else did bring an action against them as a result of the exposure to this kind of a condition. But these doctors have told you that they have heard of cases where because of the irritating kind of substance they have heard of cases of this sort; and the dust test, gentlemen of the jury was made in May 1936. You know that dust test; you know that it must have been made under the most favorable circumstances. And then they want to know: We should have had knowledge that this man was going to get this kind of a condition?

And then they go into the question of weight of Mr. Matey. In 1928 it is not disputed that Mr. Matey looked as he did in Exhibit P-1, but everybody acknowledges that, and I am not going to take much longer, gentlemen of the jury because you have been very, very patient,—you have heard the evidence. There is over $4000 in loss of wages and expenses alone; the medical expenses were [fol. 1207] over a thousand and that has been stipulated to by Mr. Rudner; and the loss of wages since the last time of his employment was at $22. a week.

Now, the court will charge you as to the law. You gentlemen are the sole judges of the facts. You have heard everything else. I am not going to bore you any further. I know that you gentlemen will take this case into consideration and realize the fact that the doctors have told you the physical condition of Mr. Matey; realize the fact that he may not live long; and yet who was the responsible producing cause of his condition? We say, gentlemen of the jury, that the evidence absolutely shows that they had knowledge way back in 1920 that the other men had gotten the skin rash; and when Professor Smyth, their own professor, comes here and says that anything that is irritating to the skin is irritating to the lung, they should have known by reason of the many chemists that they have in that factory and elsewhere, of the ultimate effect the thing would have had, not only upon Matey but upon everybody else working in that department.

Now, gentlemen, I am not going to bore you any longer. As I say, you heard the evidence. I am not going to go [fol. 1208] into a treatise of law about the statute of limitations and no statute of limitations; or this department or the other department, because that is a function of the court. The court will give you the law. But I am going to leave it to you, gentlemen of the jury, just to ask you to be fair and just. We are not asking you for any sympathy. We are not asking you to be sorry for this man. All we ask is that justice be played in this case and justice be administered. That's all we want. And when you have done that, and considered the pain and suffering of this man, and considered the pint of pus or more per day that he has been giving since 1934, and considered his physical condition, I know that you gentlemen will bring in a verdict in favor of the plaintiff and against the defendant in whatever sum, substantial in kind and quality, as you gentlemen think will fairly compensate him, not only for the injury sustained, but for the actual losses which he has had.

A Juror: Before we retire we would like to ascertain this matter in your honor's discretion.

The Court: What is it, Mr. Juror?

The Juror: Since there has been no testimony in the case as to what it costs counsel in this case for expenses [fol. 1209] incurred for hiring experts, would your honor fix a stipulated amount on the supposition that we reach a verdict for the plaintiff?

The Court: Well, if you want to know what his fee is——

The Juror: We would like to know, your honor, the amount of expenses incurred primarily for the expert witnesses that came to this court, and if possible in your discretion, the court's discretion, to know if there can be set aside a stipulated fee?

The Court: Of course that is up to the counsel. That is up to counsel. I mean I don't know what arrangements he made with his experts and I don't know his fee.

The Juror: Thank you.

The Court: That will have to come out of any verdict.

[fol. 1210] CHARGE OF THE COURT.

Now, gentlemen of the jury, in the first place let me thank you for having sat so long and patiently, and more than that for having taken such a lot of interest. I never had a jury who took so much interest in the case before it as you gentlemen have, each one of you; and it encourages me to say to each jury, I wish they would ask more questions, because, after all, you are the people who have to have the information and if you don't understand anything and don't inquire, it is rather hard to get it; and the court and counsel sometimes talk so much that the jury, I think, sometimes get the impression that they are not to say anything.

Now, in this particular case, of course, it is a civil case and the law is, as in every civil case, that plaintiff must prove his case by the preponderance of the evidence which means superiority in weight, influence or force.

This plaintiff here charges the defendant company with negligence. Now I imagine I need hardly say to you that the fact that the plaintiff is ill, as we all regret of course, and the fact that there was dust in this plant,—those two facts alone are not sufficient under the law to entitle him [fol. 1211] to a verdict. You must, as you I am sure know, consider the facts in the light of what is the accepted law; because, of course, there is no utility in doing anything else, because you, just like myself, are subject to correction by higher courts.

In this case plaintiff says that the defendant company did not exercise reasonable care under the circumstances in this plant, and I will read you just a short extract from a charge by one of the state judges which has been approved by our Court of Appeals and which I have used before: It was the duty of the defendant company to exercise reasonable care that the place in which it set the deceased at work and the system or method adopted by it for doing the work, should be reasonably safe for the plaintiff, and free from latent dangers known to the defendant company or discoverable by an ordinarily prudent master under the circumstances," that is by an ordinarily prudent employer, the word might be used. Now, considering that statement of the law, because it is, I think, both a clear and correct one, you will first notice that the defendant company has a duty to exercise reasonable care that the place in which it set the deceased [fol. 1212] at work and the system and method adopted by it for doing the work should be reasonable safe for the plaintiff. Now, in this case, let me first call again to your attention, as I did in answer to a question by one of the jurors, the place in which this deceased is set to work, and with which you are concerned, is the phosphate plant. In other words, the law has provided a statute of limitations, a statute under which you have to bring your cause of action within a certain fixed time. Now, in this case the plaintiff left the silicate plant where he was working and went to the phosphate plant; and what occurred in the phosphate plant is the fact on which any verdict must be based. In other words, the law is that you have to have a continuing injury by the defendant company; and if you assume that the injury began at the silicate plant, you have to find further that the injury continued at the phosphate plant. In other words, you of course, inspected both plants, and as I understand it, you found a certain dust condition in the silicate plant. You must also direct your mind to the phosphate plant, because you must find as a fact, in order that the plaintiff may recover, that the injury and the carelessness, the failure to exercise reasonable care, existed also at the phosphate plant. [fol. 1213] Now, I won't recapitulate the testimony as to either of the plants. We have gone into it in great detail; we have the maps, and you have heard the testimony from both sides; the testimony of Matey and some of his fellow workers as to the silicate plant was that there was a great deal of dust and so forth and so on. The testimony of some of the defendant's witnesses was that there wasn't a great deal of dust. They also had these tests made with this impinger under conditions that they claim were the same as the conditions at the time that Matey worked there. The phosphate plant, of course, the conditions with respect to the dust—and when I use the word "dust," gentlemen, you understand that I am using it in the sense that we have used it here, namely this soda ash—the phosphate plant, the soda ash was contained in that yellow tank and what were those other things called, those smaller things?

Mr. Davis: Soda ash mixing batch tanks.

The Court: Batch tanks; and Matey said that he was exposed to the soda ash there as I gathered it when he went into the Dorr plant. The defendant, on the other hand, said that that was impossible, that the soda ash came in convey- [fol. 1214] ors which were enclosed; so that in considering whether the company provided this safe place to work, you must direct your mind not only to the silicate plant, but also to the phosphate plant.

Now, the question of safe place to work, of course, depends on the facts with respect to the dust, which are in dispute as I have said, and then the further fact whether the conditions of ventilation and method of removing the dust, if there was any there, were sufficient. You have the picture.

You saw the plant. You heard the testimony of Dr. Smyth who said they were sufficient, as I remember it, and the testimony of the architect who said that the ventilation was in his judgment not sufficient.

Now, you will notice a further thing in that quotation that I read to you, and I am going to read it to you again: "And free from latent dangers known to the defendant company or discoverable by an ordinarily prudent master under the circumstances." In other words, as you can see, it is a matter of common sense that it isn't negligence not to provide against dangers that you don't know about. So that you must consider whether the master in this case, in the exercise [fol. 1215] of ordinary prudence, could discover the dangers in this soda ash. It is the contention of the defendant company that the ordinarily prudent master could not discover, that there had been no recorded cases of lung abscess as a result of breathing this soda ash, and that therefore even admitting this to be a lung abscess in this case, that they had no reason to know it. Now, there is a case which was given to me by plaintiff's counsel, and I think it is illuminating on this point, with respect to manganese dust and the court, our high court, said: "While manganese dust as a source of poisoning, presents to some extent a recent acquisition of knowledge, nevertheless there was evidence which indicated that the defendant was chargeable with notice of its dangers. Numerous cases of manganese poisoning had their origin in its plant and since 1918 it had employed consultants for its dust poisoning problems." Now, in this case, as I understand plaintiff's contention from the argument he made before me when you were out of the room, it is his theory that the ordinarily prudent master in this case should have known about the dangerous qualities of the soda ash, because there were cases of injury or rash on the hands and other places, I think, of the body of some of [fol. 1216] the employees that worked there. It is for you to consider whether that knowledge reasonably carried with it the knowledge that soda ash which the Master knew injured the skin also brought about lung abscess.

Now, that brings us, I think, to the most—at least I won't say most hotly contested point, because they all were hotly contested, but the point on which there was most evidence. It is also, of course, incumbent upon the plaintiff to prove that his injury was proximately caused by reason of the defendant's acts. Now, it is the defendant's contention that this lung abscess—and that is the theory on which the plaintiff and his experts finally rested, in other words not the theory of bronchiectasis that we heard so much about, because finally the plaintiff's doctor testified that it was an abscess and that the abscess was caused by the inhalation of this dust. You will remember that the chemist, Dr. Gettler, I felt had one theory when he started and finished up with another theory when we had further testimony and when I had this impartial witness. Now, I don't want to waste either of our times by criticising Dr. Gettler. He said that he didn't change his theory, that we simply were [fol. 1217] so dumb that we didn't understand—he didn't use the word "dumb" but that was the effect of it, that we didn't understand the learned character of his theory. It is difficult for me to accept that idea. He stated that this soda ash when brought in contact with water made sodium hydroxide which admittedly he stated, is a very caustic and corrosive substance which burns when applied to any of the lung tissue. He afterwards changed that view and admitted that it did not make sodium hydroxide at all, but that the soda ash or sodium carbonate when mingled with water was hydrolized and the hydrolization produced ions of hydroxyl which was an entirely different thing from sodium hydroxide and not nearly as alkali; in fact the testimony of the impartial chemist was that it was as one to four. Well, taking that correction of Dr. Gettler's which the other chemists, I think, agreed to, you must then consider on the testimony of the expert for the plaintiff, whether those hydroxyl ions which had some alkalinity but not merely as much—as I say, four times less than Dr. Gettler's original testimony was, produced this lung abscess.

Now, the defendant's experts stated that it did not produce the lung abscess. Their theory, as I understood them, [fol. 1218] was that the lung abscess was produced, that it was caused by the operation that the plaintiff had for hernia. I won't go into it, I mean I won't try to recite to you their testimony. You will remember that. One doctor, I think, said that the lung abscess was from a foreign body which might come from the teeth, and the other one had the view that the foreign body had come from the hernia. Anyway they agreed that the lung abscess would not be caused by anything, or in this case but by a foreign body. Excuse me, gentlemen—well, I just see the requests. This is a statement of fact which is true:

The plaintiff has offered no proof to the effect that any employee of the defendant company working in the silicate or phosphate departments has at any time suffered any injuries to his respiratory organs or any part thereof.

I may say in that connection, gentlemen, I charge you to disregard entirely counsel's reference to another employee who was in the Bonnie Burn Sanatorium. There is no evidence that his being there had anything to do with his working for the defendant company.

Do you contend that the rash on the plaintiff or skin disease on the plaintiff was occupational or not, Mr. Turtur, on the particular plaintiff?

[fol. 1219] Mr. Turtur: I don't understand, your honor please.

The Court: Well, do you contend that Matey's rash was due to the soda ash?

Mr. Turtur: Yes, your honor.

The Court: Then if that is so, gentlemen, I think I should call your attention to the fact that a doctor was called who testified that he had made thorough tests of Matey and that it was his judgment that the skin disease from which he suffered was not due to the soda ash, but was due to what he referred to as Athletes' Foot or fungus and that although he had been paid on the basis of a disease due to the soda ash, that payment was stopped after the doctor's testimony.

Now, do you plead—you just plead the assumption of risk, don't you, Mr. Rudner?

Mr. Rudner: That's right.

The Court: Well, I will charge your charge on that. The defendant sets up a defense in all actions of this kind which says that the employee assumes the risk and if he assumes the risk of the injury then there should be no recovery.

"An employee assumes all ordinary risks of *a* his em-[fol. 1220] ployment. If he works in dust, the escaping of a reasonable quantity of dust is an ordinary risk. For the plaintiff to recover he must establish by a preponderance of evidence that more dust escaped in this factory than was reasonable in the operation thereof and that he suffered injury thereby and from risks not ordinarily assumed by an employee of his class. If he has complained of escape of dust in unreasonable quantities and such unreasonable escape is not prevented in a reasonable time, such excess escape of dust becomes one of the risks of the employment and he cannot recover therefor."

I think that is all the law that I want to give you, gentlemen, other than this, that neither counsel are in disagreement with respect to the damages. In all, what we call tort cases, the elements of damage are usually well settled and agreed upon and they are in this case his pain and suffering, which of course is a matter for a jury to measure. You have heard, I mean there is no dispute as to his physical condition. Then his earnings and his medical expenses, and I understand that they are agreed to amount to about $4,000. As I say, of course you don't reach the question of damages unless you decide under the charge that I have given you that the defendant company is liable. Are there [fol. 1221] any exceptions other than to requests that I have not charged? I think I charged substantially both sides' requests as far as that goes.

Mr. Turtur: Your honor, may I make a suggestion if you don't mind? You used the word "deceased" in your charge. I presume that where you used the word "deceased" you mean the plaintiff in this case.

The Court: You mean in my quotation?

Mr. Turtur: Yes; so that there will be no misunderstanding on the record, that was all.

The Court: Yes, I beg your pardon, I did. The plaintiff it should have been. Are there any exceptions except to the requests which are automatically granted.

Mr. Rudner: I take exception to your honor's failing——

The Court: I said they were already granted.

Mr. Rudner: Separately. I take exception to your Honor's reading from another case, that manganese case, the statement taken from that case.

The Court: It is curious for you to except to it because it is in your favor.

Mr. Rudner: But it contains statements of facts.

[fol. 1222] The Court: The facts were in your favor Mr. Rudner, if anything.

Defendant's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Rudner: Another thing I take exception to, your honor leaving to the jury the possibility of knowledge being acquired with respect to possible lung injuries from the fact that rashes developed on the hands of employees.

Defendant's counsel prays an exception which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

The Court: Have you any?

Mr. Turtur: No, your Honor.

The Court: Again I thank you gentlemen and you must not mind, I will say this—occasionally counsel and the court become a little fractious. You must not mind. They forgive each other.

A Juror: Your honor before we retire may I ask a question?

The Court: Certainly; and I am glad you ask now [fol. 1223] because it is not my practice to permit the jury to send out and ask questions, because it usually gets everybody confused.

The Juror: What I want to find out, what was the result of the findings on that powder?

The Court: I didn't give that to the chemist because it seemed to me that we had all the information we needed finally. I think if we hadn't gotten it finally it would have been more pertinent.

(The jury retired.)

DEFENDANT'S EXCEPTIONS

Defendant's counsel prays an exception to the refusal of the court to charge request No. 1 of defendant which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge request No. 2 of defendant which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge request No. 3 of defendant which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 1224] Defendant's counsel prays an exception to the refusal of the court to charge defendant's request No. 4 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge defendant's request No. 5 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge defendant's request No. 6 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge defendant's request No. 7 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge defendant's request No. 9 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 1225] Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 10 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 11 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 12 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 13 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 14 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 1226] Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 15 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 16 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 17 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 19 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 20 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 1227] Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 21 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 22 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the refusal of the court to charge Defendant's request No. 23 which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the charging by the court of such parts of plaintiff's request 1 as the court charged. Which exception is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the charging by the court of such parts of plaintiff's request No. 2 as the court charged. Which exception is hereby allowed and [fol. 1228] sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the charging by the court of such parts of plaintiff's request No. 3 as the court charged. Which exception is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Defendant's counsel prays an exception to the charging by the court of such parts of plaintiff's request No. 4 as the court charged. Which exception is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

[fol. 1229] PLAINTIFF'S REQUESTS TO CHARGE.

1. It is the law of this State that under a contract of employment, it becomes the master's duty to take reasonable care to provide a proper and safe place in which the servant may work. So, in this case, the defendant, The Grasselli Chemical Company, had the duty to take reasonable care to provide a proper and safe place in which the plaintiff, Maty, could work. Downing v. Oxweld Acetylene Co., 112 N. J. L. 28; Cichocki v. Geigy Co. Inc., 183 Atl. 463; and Davis v. New Jersey Zinc Co., 116 N. J. L. 102.

Whether or not the defendant took reasonable care to provide the plaintiff with a proper and safe place to work is a question for you gentlemen to determine, after considering all the evidence in the case.

2. If you gentlemen find that dust arose from the operations of the plant, and was not carried off but moved after rising toward the ceiling in a downward direction, to which dust the plaintiff was exposed, and which exposure to caused his illness, the existence of such dust by reason of the operations of the plant is sufficient to warrant an inference that the ventilation was inadequate, and is ample evidence of the defendant's negligence. Downing v. Oxweld [fol. 1230] Acetylene Co., 112 N. J. L. 28; Cichocki v. Geigy Co. Inc., 183 A. 463.

3. The defendant has set up in addition to other defenses, the fact that the plaintiff was contributorily negligent and that he assumed the risk.

In order for the defendant to show that the plaintiff contributed to the injuries or assumed the risk of the injuries, the defendant must show, and you must believe, that the plaintiff was obvious of the dangers which the physical conditions of the plant produced. In other words, the defendant must show that the plaintiff knew that the inhalation of this dust was dangerous to his health. The mere fact that the plaintiff worked in a place where obnoxious and harmful dusts or substances were produced, does not say that the plaintiff contributed to his injuries by negligence or that he assumed the risk of his injuries, for "It is not the obviousness of the physical condition or situation that charges the servant with the assumption of the risks which arise from it, but the obviousness of the dangers which the physical condition or situation produces." Downing v. Oxweld Acetylene Co. 112 N. J. L. 28; and Ducjack v. New Jersey Zinc Co., 104 N. J. L. 575.

[fol. 1231] 4. The fact that the defendant's ventilating system is as efficient as those generally in use in like industries, does not excuse the defendant from liability, if you find that even so, dust arose from the operations and there were further movements of the dust in a downward direction. Cichocki v. Geigy Co. Inc., 183 A. 463.

[fol. 1232] DEFENDANT'S REQUESTS TO CHARGE.

1. Negligence is a fact which must be proved by the plaintiff. It will not be presumed. There is always a presumption against negligence.

2. When the plaintiff's evidence is equally consistent with the absence of negligence as with the existence of negligence on the part of the defendant, the plaintiff must fail because there is always a presumption against negligence and in favor of innocence.

3. In order for the plaintiff to recover from the defendant in this cause, the plaintiff must show something more than that the defendant was possibly responsible for plaintiff's injuries.

4. Negligence of the defendant in this case cannot be presumed from the fact that the plaintiff is now sick and was at one time in the employ of the defendant. The burden of proof is on the plaintiff to show that his injuries were caused by the breach of some duty which the defendant owed to the plaintiff. The care the defendant should have exercised toward the plaintiff is such care as

a reasonably prudent and careful person would have exercised in a like case and under like circumstances.

5. The burden of proof is on the plaintiff to show that his [fol. 1233] injuries were caused by the breach of some duty which the defendant owed to the plaintiff, and that this breach of duty was the proximate cause of the injuries complained of.

6. If the jury finds that the defendant company did not know or in the exercise of reasonable care should not have known that the inhalation of soda ash dust, phosphate of soda dust or metasilicate dust would produce the results which the plaintiff claims were produced, your verdict must be for the defendant.

7. As negligence necessarily involves a violation or disregard of some duty which is known to the party charged therewith, it follows that knowledge of the facts out of which the duty arises is an essential element for consideration in determining whether one has exercised reasonable care or has been guilty of negligence. Therefore, in order that an alleged act or omission of the defendant in this case, may be regarded as negligent, the plaintiff must show that the defendant either knew or with the exercise of reasonable care should have known, that such alleged act or omission involved danger to the plaintiff under the facts and circumstances of this case.

8. The plaintiff has offered no proof to the effect that any employee of the defendant company working in the sili- [fol. 1234] cate or phosphate departments has at any time suffered any injuries to his respiratory organs or any part thereof.

9. The evidence in this case is uncontradicted that no employee of the defendant company working in the silicate or phosphate departments has at any time suffered any injuries to his respiratory organs or any part thereof.

10. The defendant, as the employer of the plaintiff during the period of his employment by the defendant company had the right to assume, in the absence of proof of knowledge to the contrary, that the plaintiff was of average health and strength, both of mind and of body.

11. If you find that the plaintiff was hyper-sensitive to injury to his respiratory organs by reason of the inhalation of soda ash, phosphate of soda or meta-silicate dusts, you must find for the defendant in the absence of proof that the defendant knew that he was so hyper-sensitive with respect to his respiratory organs.

12. The evidence in this case is uncontradicted that the skin condition of the plaintiff under his arms, about the body and in the groin and rectal region was non-occupa- [fol. 1235] tional in nature, and had no relation to soda ash dust, meta-silicate dust or phosphate of soda dust, but was caused by some fungus growth.

13. If the plaintiff had knowledge of the dangerous conditions which he says existed at the plant of the defendant, all right of recovery is barred; and although there might have been unusual conditions connected with the services to be rendered, due to the methods used in the operation of the plant, the plaintiff assumes the risk thereof if they were known to him or were so obvious that he is presumed to have had knowledge of their existence, and he continued without objection to work at the plant. This rule applies as well to those risks which arose or became known to the plaintiff during his period of employment as well as to those which were in contemplation at the time of the original hiring.

14. It may be stated as a general rule that an employee is duty bound to inform himself by all reasonable means concerning the perils of his employment. He must exercise his intelligence and when a situation suggests investigation and inspection in order that its dangers may fully be disclosed he is under the obligation of investigating and inspecting. The master has a right to expect him to be alert to inform himself of existing condition; and he can- [fol. 1236] not attack the master from the shelter of unjustifiable ignorance of the business machinery and methods which he is employed to use.

15. The employee may notify the employer of a dangerous condition, and continue in the service for a reasonable time relying on the employer's promise to remedy the dangerous condition disclosed by the employee; yet, if the condition is not remedied within the promised time, his further continuance in the service is at his own risk.

16. The Court instructs the jury that if the jury find, from all the evidence in this case, that the plaintiff's physical condition was caused or superinduced by one of several causes, one of which would have made the defendant liable, and others of which would not, and it can be as reasonably inferred that the plaintiff's physical condition resulted from one of such causes as from another, then your verdict must be for the defendant.

17. The Court instructs the jury that if, from all the evidence in this case, the direct or indirect cause of the plaintiff's physical condition lies wholly within the realm of conjecture, speculation or doubt, you must find a verdict in favor of the defendant.

18. An employee assumes all ordinary risks of his employment. If he works in dust, the escaping of a reasonable [fol. 1237] quantity of dust is an ordinary risk. For the plaintiff to recover he must establish by a preponderance of evidence that more dust escaped in this factory than was reasonable in the operation thereof and that he suffered injury thereby and from risks not ordinarily assumed by an employee of his class. If he has complained of escape of dust in unreasonable quantities and such unreasonable escape is not prevented in a reasonable time, such excess escape of dust becomes one of the risks of the employment and he cannot recover therefor.

19. If you find that the defendant used reasonable care with respect to dust conditions in its use of phosphate of soda and soda ash in its phosphate department, you must find for the defendant.

20. If you find that the plaintiff suffered no injuries to his respiratory organs while employed in the phosphate department of the defendant company, your verdict must be for the defendant.

21. If you find that the defendant had no knowledge of or in the exercise of reasonable care should not necessarily have known that dust conditions with respect to phosphate of soda and soda ash dusts as they existed in the phosphate department of the defendant were dangerous to the health of the plaintiff during his employment therein, your verdict must be for the defendant.

[fol. 1238] 22. The jury is instructed to eliminate from their consideration all chemicals, dusts, fumes and gases of every kind and description excepting soda ash, phosphate of soda and meta silicate dusts. The plaintiff does not contend that any chemicals, dusts, fumes or gases of any kind or description other than dust from soda ash, phosphate of soda and metasilicate caused the injuries of which he complains.

23. During the course of this trial statements have from time to time been made by counsel for the plaintiff which were improper in that they contained statements of alleged facts not presented in the orderly manner of being presented through witnesses under oath. I instruct you to disregard each and every statement so made by him.

[fol. 1239] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title omitted]

ARGUMENT ON MOTION TO SET ASIDE VERDICT

[fol. 1240] Appearances:

Mario Turtur, Esq., for the plaintiff;
Katzenbach, Gildea & Rudner, Esqs., for the defendant.

Argument Before Hon. William Clark, Judge, at the Post-office Building, Newark, New Jersey, on Monday, July 13, 1936.

[fol. 1241] Mr. Rudner: May it please your Honor——

The Court: Now before this argument proceeds, in these cases it is my practice, that is, in cases of this character, and it seems to me most useful, to ask counsel if they will agree that if I decide to set aside the verdict instead of setting it aside and having a new trial, a directed verdict be ordered, in order that the losing side may appeal; otherwise you have to go all through the trial again.

Mr. Rudner: Your Honor please, the rule your Honor allowed provided that judgment be entered for defendant against plaintiff, notwithstanding the verdict, or in lieu thereof, a new trial be granted. Of course the verdict of the jury was for the plaintiff in this case, and I suppose judgment has been entered for the plaintiff.

The Court: That is correct, but I want to put the case in such a posture that instead of having a new trial, if I decide that, legally speaking, the defendant is entitled to one, that it can be appealed.

Mr. Rudner: Well, of course we wouldn't want to waive our right to an appeal.

The Court: You wouldn't waive it.

[fol. 1242] Mr. Rudner: That question is directed to the plaintiff?

The Court: Yes, it is directed to the plaintiff. I said, counsel——

Mr. Turtur: Just so that I may get it correctly, your Honor please, may I ask again what your Honor wants me to do, or what your Honor's question is?

The Court: Well, if I decide that, legally speaking, you were not entitled to a verdict, I can set the verdict aside and you can go all through a new trial again. That is the ordinary procedure.

Mr. Turtur: Yes, your Honor.

The Court: On the other hand, if counsel will agree, I can reverse myself on what I did at the time of the trial, and grant Mr. Rudner's motion to direct a verdict, which then gives you a right to appeal without another trial.

Mr. Turtur: I agree to that, your Honor please.

The Court: I mean I have done that in several cases where the trials were elaborate.

Mr. Rudner: I expect to submit authorities, your Honor, whether if counsel agrees to it or not your Honor has authority under this case, under a very recent case in the [fol. 1243] United States Supreme Court to enter a judgment for the defendant, notwithstanding the verdict. I have reference to the Redman case.

The Court: That would be the same thing.

Mr. Rudner: If your Honor please——

Mr. Turtur: Do I understand your Honor that Mr. Rudner agrees to your Honor's suggestion?

The Court: He is not injured by it; he would be benefited by it.

Mr. Rudner: At the very inception of the argument I want to bring to your Honor's attention——

Mr. Turtur: Mr. Rudner, would you be so kind as to step back here so that I can take notes on what you are saying?

Mr. Rudner: During the course of my motion for a directed verdict, I directed your Honor's attention to the fact that in a consideration of motion for direction of verdict, the rule of law to be followed is not such rule as may be considered in the state court in weighing the evidence, but that the rule is that of substantial evidence, which prevails generally in the Federal Court.

The Court: I agree to that.

Mr. Rudner: My recollection of the record does not show [fol. 1244] it, your Honor please. The question of the scintilla rule and the rule of substantial evidence was argued.

The Court: I thought I tried to convince Mr. Turtur——

Mr. Rudner: On page 1156, Mr. Turtur says, "Well, is your Honor going to apply the law of New Jersey to these cases, or the Federal law?"

The Court: Didn't I tell him I was going to apply——

Mr. Rudner: And your Honor said, "The scintilla rule applies to the Federal court, Mr. Turtur. You will please allow me to instruct you on that point."

The Court: Correct.

Mr. Rudner: "I realize," Mr. Turtur says, your Honor is a greater teacher than I could ever learn in the field of Federal law or any law, but I just stated to you that where the only question" (interrupted by the court) "The scintilla rule applies, Mr. Turtur."

Now, as I understand it, the scintilla rule does not prevail in the Federal courts but the rule of substantial evidence.

The Court: It does not.

[fol. 1245] Mr. Rudner: That is correct. So that is the starting point. So I submit, sir, that the very recent case of the Pennsylvania Pulverizing Company vs. Butler, 67 Fed. 2d 311, where of course Judge Woolley reaffirmed the law with respect to the scintilla rule, and the law being applicable in the Federal court, but on the facts of that case with respect to the law as enunciated by Judge Woolley, it appears that the situation in this case is such that a verdict should have been directed for the defendant, and that at the present point a judgment not withstanding the verdict, should be for the defendant.

Now as a preliminary thing, may I suggest this: that if it be contended by the plaintiff that this man was a man of special susceptibility to this very thing, that it is entirely irrelevant, because the law takes cognizance only over the objective individual, not of the subjective individual. That has been stated by numerous authorities. It is perhaps best expressed in the Fifth Circuit in the case of Stevens & Sons

Co. v. Daigneault, cited on page 8 in my brief. In that case the plaintiff worked with an emulsion composed of petroleum oil, water and alkali. In the process of working he developed a severe body eruption resulting in pain to his body and [fol. 1246] legs. Here is the statement of the court—this also of course covers the element of knowledge: "On the undisputed evidence, it is clear that the risk or dangers incident to the occupation were not unusual or extraordinary, were no more obvious to an employer than to an employee, that the work was not inherently dangerous to the average man, and that it was not until the element of unusual susceptibility of the plaintiff was introduced——"

The Court: Will you get me 71 Fed. (2d), please?

Mr. Rudner: (Continuing) "that the occupation became unhealthful and liable to cause injury. The plaintiff's evidence on this aspect of the case was to the effect that some men could work in petroleum oil and alkali with impunity, and that others could not. Unless and until knowledge of plaintiff's susceptibility was brought home to the defendant, together with reason to believe that the plaintiff was ignorant of this susceptibility, or the probable effect upon him of the solution, there could be no breach of any duty to warn."

Now there is another feature I want to suggest to your Honor, and that is as to the same point. I cite the New Jersey case of Ward v. West Jersey & Seashore R. R. Co., where [fol. 1247] the court also held that the objective standard prevailed, and we are dealing with the objective individual. The law contemplates an individual of average strength, both of mind and body.

The Court: I will agree to that, too.

Mr. Rudner: Now one other feature with respect, your Honor please, to the inspection which was made of the premises by the jury, that, as held by the Court of Errors and Appeals is held absolutely not binding on this motion or on a motion for direction of a verdict, because even though the inspection has been made, Chancellor Walker said for the Court of Errors and Appeals in the case of Garland v. The Furst Store, 93 N. J. Law 127, "that even though an inspection"—this is not notes, just paraphrasing—"that even though an inspection or examination of the premises was made by the jury, that fact could in no event be conclusive and prevent the court from controlling and considering the issue as a matter of law and that the question presented to the court of review should be decided upon what appears in the record brought up to the appellate tribunal notwithstanding that a view was had by the jury."

Now during the course of the argument on this case for [fol. 1248] a directed verdict, your Honor made this statement on page 1171: "I am going to let this case go to the jury."

The Court: You needn't read what I said. I know what I said. I am not interested in what I said.

Mr. Rudner: All right. I submit, sir, the LaPorte case recently decided by Judge Forman in the radium cases is dispositive of this case with respect to knowledge. Although that was an equity action, the fundamental question involved was that of knowledge with respect to the possible and probable injuries which might result from the use of radium. Page after page is covered with statements and citations with respect to knowledge and knowledge alone.

The Court: Page after page of what?

Mr. Rudner: Of Judge Forman's decision in the LaPorte case, LaPorte vs. Radium Corporation, a very recent case.

The Court: Get me 70 Federal.

Mr. Rudner: Now the Pulverizing case, as your Honor had before you——

The Court: You mean the Butler case. You don't have to talk to me about that.

Mr. Rudner: Well, I submit, sir, that the Pulverizing case [fol. 1249] is dispositive of this case. I call your particular attention to this language by Judge Woolley: "The plaintiff's evidence of the defendant's ventilating system might show negligence were it permissible to infer negligence from the fact of the defendant's injury, or it might show a spark of negligence from the fact that the windows in the tower were kept closed." In that case, your Honor recalls, there was a decided dust condition even when the ventilators were operating, and in the particular part where plaintiff most complained of, the ventilating system didn't operate and the windows were closed—"But without more," Judge Woolley says, "to prove that keeping the windows closed, might not in an ordinary manufacturing process, have been done or should not, for the plaintiff's protection, have been done, that evidence standing alone, is not enough to submit to the jury, or if submitted, is not enough to sustain an affirmative finding of negligence. It left uncertain and unproved, and therefore left the jury to conjecture, whether the defendant did something it should not have done or failed to do something it should have done."

[fol. 1250] But here is the more important language: "We think the real trouble on this issue of warning is that the plaintiff complains that the defendant did not warn him of the pathological effect of inhaling silica dust. This may be true, but it is not certain that the defendant knew or should have known it in time seasonably to warn the plaintiff. We find no evidence on the part of the plaintiff charging the defendant with knowledge of the disease. Now is there evidence that the disease normally follows contact with silica dust, or what conditions will produce the disease, or how long it takes to develop, or when developed, what precisely is its character.

The Court: What case is that from?

Mr. Rudner: That is the Pulverizing case—"We find it difficult to believe that an employee of normal intelligence working in dust has to be told that inhaling dust of any kind in large quantities is injurious for, obviously, when he is handed a mask and put to work with other men wearing masks in a place equipped with artificial ventilators, that is a plain enough warning that dust is deleterious.

The Court: That is not quite the point here; there were no masks.

[fol. 1251] *The Court: That is not quite the point; here there were no masks.*

Mr. Rudner: In the next case, your Honor please, Grammer vs. Mid-Continent Petroleum Corp. 71 Fed. (2d) 38, that I think, your Honor please, is a very excellent decision. I have never heard of the judge who wrote it before, but he writes clearly of the whole situation, and he cites with approval the Pulverizing case. In that case the decedent was employed as a tank cleaner. He worked from April 4, 1921 until about the time he became ill with some lung trouble and he died July 7, 1932. His condition was diagnosed as pneumoconiosis, a disease characterized by the formation of a deposit in the lungs, a growth of fibrous tissue, and caused by the inhalation of foreign matter. The decedent's doctor testified that by the process of elimination, he deduced that death resulted from his occupation. In this connection, may I direct your Honor's attention that Dr. Runnells——

The Court: The dissenting judge was a former Senator from New Mexico; I don't know about the other judge.

Mr. Rudner: Dr. Runnells did the very same thing in [fol. 1252] this case, by a process of elimination deduced that this lung abscess developed from inhalation of this dust. Now on page 40, with respect to the cause of death, the court said: "Among other reasons for directing a verdict"—your Honor will read—does your Honor want me to read while you are reading the case?

The Court: No, I am reading the case. Now, you see, Mr. Rudner: "Appellee was engaged in the refining of oil, a business attended with some danger. Its equipment was standard and in perfect condition. It followed the practice expressly approved by the National Safety Council and impliedly by the Bureau of Mines."

Mr. Rudner: Is that the Grammer case?

The Court: Yes.

Mr. Rudner: On page 41 of that case, the question of knowledge was discussed: "It is not contended that appellee in fact knew that pneumoconiosis or any other occupation disease would follow from its practices. In fact, no one knew it, for the doctor explored medical books in vain to find another such history." We have that very situation in this case. Not a doctor for plaintiff or defendant, [fol. 1253] nor Dr. Gettler, testified that they ever heard or read of a case of a lung injury or injury to the respiratory organs arising from the inhalation of these dusts, and what is more significant, page 41—"That the still cleaners worked steadily for years without illness strongly evidences that appellee had no knowledge nor reason to suspect that occupational disease might follow long years of service. The Vice-President in charge of refining operations for appellee testified, without contradiction, that in 26 years refining experience, he had never heard of another such case."

We have here from the Solvay process, the largest manufacturer of soda ash in the country, a doctor of 35 years experience, examining every man in the department, knowing about his illnesses outside of the department, testified he never heard, read or came across a case of lung injury resulting from this particular dust, and where a dust condition far worse than any dust condition we had, prevailed.

Now, on the question of heat, your Honor will notice that in the Grammer case the court gives certain headings to [fol. 1254] certain parts of the case that deal with heat. Much was made of the fact that while this man worked in the silicate department around the furnace, there was excessive heat. Here is an interesting statement by the court in that case: "Furthermore, the heat was not a contributing factor to the thickening of the fibers of the lung. Exposure to heat may well have lowered Grammer's resistance to disease, just as all hard work takes its toll. The surgeon at the operating table and the nurse at his side, the captain on the bridge of a liner and the stoker in the hold, the lawyer at the trial table and the judge on the bench, all give something of themselves to their tasks. But the lowering of resistance that comes with all hard work, is not actionable." Now there are some other cases cited in my memorandum which go to the same effect.

The Court: I don't see that any of them seem in point except that one. What other case do you think was in point? Have you any other cases, Mr. Rudner?

[fol. 1255] Mr. Rudner: On page 14, your Honor, I cite a case in Illinois involving—there are a group of cases in this country involving creosote poisoning on railroads where employees handled ties that have been dipped in creosote. Now, creosote is definitely known as poison and during warm or hot weather yields certain fumes,—the case of Pinkley vs. Chicago & Eastern generally cited—I think it is an excellent case, your Honor. In that case plaintiff worked in the yards of defendant handling pine piling, freshly treated with creosote or a coal tar preparation of creosote.

The Court: Have you got the case here?

Mr. Rudner: No, I haven't got the book here but I have extracted rather at length.

The Court: I have read your extract, it doesn't do me any good.

Mr. Rudner: But I have made a lengthy extract, I have quoted at length from the case. That case is particularly significant in this case because plaintiff contends that the mere fact that the employee, during the summertime, developed what they called a mechanical irritation around the forearms where the sleeves move against the wrists, [fol. 1256] that fact should have put them on knowledge with respect to injuries to the lungs. Now, this Pinkley case absolutely unquestionably disposes of that issue and there is a whole line of cases dealing with the same situation. May I read that? "Plaintiff worked in yards of defendant handling pine piling, freshly treated with creosote or a coal tar preparation of creosote. Plaintiff and other employees had during certain months observed fumes coming from these preparations which caused a burning sensation, and sometimes caused the skin on the face and arms to blister and peel off. In August 1907, plaintiff and a few other laborers were directed to unload piling from a coal car which had just arrived. The timbers had been freshly treated. It was a hot day, and the preparation was dripping. The foreman furnished the men vaseline for their face and hands. All the men experienced the usual burning sensation excepting that plaintiff suffered a severe case of dermatitis venenata or eczema of long duration and which was very painful in nature. Pustules and sores formed around his mouth and nostrils. The medical testimony showed that creosote is a poison, and [fol. 1257] that when highly concentrated and in large quantities, it may throw off fumes which, coming in contact with the skin or membrane of the nose, may cause an irritation thereof. The testimony for defendant, both lay and medical, was to the effect that the plaintiff's case was the first report of poisoning from the preparation received by them. It also appeared that on the same day that plaintiff suffered his injuries, several other men handling timbers containing creosote received burns necessitating medical treatment, but that the injuries of all except one of the men and the plaintiff were of a temporary nature and readily yielded to treatment." Here is what the court said:

"Does the fact that the injuries which the appellee received were more serious than he anticipated, and resulted in a disease of a permanent nature, render appellant liable in this case? In our judgment, under the facts disclosed by the record, it does not. The record shows that appellant, as well as other companies, had been using this coal-tar preparation on timbers for a number of years, and fails [fol. 1258] to disclose any injuries other than blistering and peeling off of the skin, except in the case of appellee and an employee of the Illinois Central Railroad Company on the same day. Out of about 125 men who had worked for appellant and had handled timbers treated with creosote, appellee was the only one who ever claimed to have been permanently injured by the creosote or creosote fumes. None of the men working with appellee on August 6th suffered any injuries from working with the piling, other than the burning sensation and the blistering and peeling off of the skin. So far as the record discloses, appellee was the first person to sustain any serious or permanent injuries from handling timbers treated with creosote, during the many years this substance has been in use as a preservative for wood. Under such circumstances, a finding that appellant know-, or by exercising ordinary diligence might have known, that the coal-tar preparation was liable to produce the injuries of which the appellee complains, is manifestly without any evidence whatever to support it. If the appellant did not know, or by exercising ordinary diligence could not have known, that such [fol. 1259] injuries were liable to result, then the law did not impose any duty upon it to warn appellee of the danger of receiving such injuries, before or at the time of giving the order which appellee alleges was negligently given."

Now, that case was followed by the Pecas & N. T. Ry. Co. vs. Collins, 173 S. W., where a similar situation was——

Mr. Turtur: Your Honor please, that case was reversed.

The Court: Which case was reversed?

Mr. Turtur: In 212 S. W. page 477, the Pecas case that you are just citing to the court, 212 S. W. page 44 of our brief.

Mr. Rudner: I had no way of tracing that through.

The Court: You had the same way of tracing it that any other lawyer had. Is it the same case?

Mr. Turtur: Yes, your Honor, page 44.

Mr. Rudner: I have no way of checking Northwestern. It might have been, I don't know. But the Illinois case just cited has been consistently cited and is cited in the Grammer case, the one your Honor has before you, the [fol. 1260] Illinois case. Now, I say, sir, on all those cases and the law, having regard to the facts in this case on the mere knowledge question that the judgment should be for the defendant.

Now, we have the other question, your Honor please, with respect to the statute of limitations which was a very, very strong point in this case. Your Honor recognized that too. Your Honor said on page 1175: "I think it is very questionable that there is any evidence to sustain a verdict of subjection in the phosphate department." Now, on the plaintiff's own testimony he never handled any of these products, the nearest he worked to soda ash operation was 50 feet away, his figures, and that what he worked with was entirely moist in nature except outside he worked three days outside and two days inside. The testimony of all our witnesses, the superintendent and his foreman and the shift worker, was to the effect that he worked four days outside and one day inside and his work never took him around the phosphate operation. That was a silo at the other end of the room entirely away from it. [fol. 1261] Now, the test by Dr. Smyth with respect to the quantity of dust, the soluble dust present at the nearest point that he worked to the soda ash operation, was less than one milligram per cubic meter of air against a safe operation of 69 milligrams. In other words, a man can work steadily eight hours a day with a concentration of 69 milligrams of this soluble alkali dust and not suffer an injury, and the figures showed less than 1 milligram per cubic meter of air in this particular operation.

Now, of course plaintiff is going to contend that the last inhalation—but he has to show that there was an inhalation of this dust which he claims was injurious after November 1, 1932, and your Honor will recall the dates, that Mr. Matey did not work in the silicate department after November 1, 1932, that commencing November 1, 1932, until October 23, 1933, he worked in the phosphate department exclusively, as we contend, four days outside and one day a week inside,—he says three days outside and two days inside, and that the suit was commenced on October 1, 1935. In other words, there is no showing, [fol. 1262] no legal showing, no substantial showing, that after November 1, 1932, or two and a half years before the suit was started he was subjected to the dust which he claims caused his injury.

Now, an interesting case with respect to the court taking into consideration the facts of that nature is that of Calhoun vs. Washington Veneer Co., 15 Pac. 943, State of Washington 1932, cited on page 18 of my brief. In that case the suit was started in September, 1931. The plaintiff had worked in a glue room of defendant from April 20, 1926 until on or about the middle of May, 1928. This room was not ventilated in accordance with the statutes of the state. He worked from the middle of May, 1928, until November 17, 1928, in another room of the same company which was properly ventilated. There the court held that the statute of limitations was applied because the running of the statute stopped with termination of the work in the room where he had been previously employed and where the ventilation was proper.

The Court: I don't think there is anything to the statute of limitations, Mr. Rudner. The only thing that I am in [fol. 1263] doubt about, and I am still in doubt about it, I was at the time of the trial, was whether there was sufficient knowledge of the injurious effect of this soda ash to charge the defendant. I have read your cases, Mr. Turtur. The only two that seemed to be in point on that issue, at least as far as I could tell from my examination, is Fritz vs. Elk Tanning Co., which depended somewhat on the statute of Pennsylvania, and Harvey vs. Welch in New Hampshire where the substance was oxalic acid, which of course is of quite a different character from soda ash.

Mr. Turtur: I refer your Honor to the Jacque case.

The Court: Are there any cases nearer than that?

Mr. Turtur: Oh, yes, the Jacque case reported——

The Court: But that is not at all in point.

Mr. Turtur: Oh, yes, your Honor, the Jacque case refers to the fact that it is any substance which ~~may~~ cause some injury.

The Court: That was silica, that is a silicosis case. If [fol. 1264] your plaintiff had silicosis I would have no doubt about it.

Mr. Turtur: Yes, I wonder if Mr. Rudner is through.

The Court: I thought he was.

Mr. Turtur: Are you through?

Mr. Rudner: Yes.

Mr. Turtur: May it please the court——

The Court: Are there any cases closer?

Mr. Turtur: Closer to what, your Honor?

The Court: Closer to the facts necessary to sustain a verdict.

Mr. Turtur: Why, yes.

The Court: You have given me rather a long memorandum, so I don't want to overlook any, if there are any closer.

Mr. Turtur: No. May I refer your Honor to page 40 of our brief. The fact that they did not have knowledge makes no difference, your Honor please——

The Court: That is preposterous.

Mr. Turtur: —in anticipation of injury.

The Court: Now don't lay down any rules of law to me that aren't sound, please. Your case is, to my mind, weak enough as it is.

[fol. 1265] Mr. Turtur: But your Honor please, may I state this to the court: In the Pinkley case that Mr. Rudner has cited to your Honor, there was a case of where the plaintiff had——

The Court: I didn't ask you to distinguish his cases, I asked you to give me cases on your side with respect to knowledge.

Mr. Turtur: Well, I refer your Honor to page 18, your Honor please, of our brief as to the question of the knowledge of the defendand, and I refer your Honor to the Louisville vs. Wright case.

The Court: Wait a minute, wait a minute.

Mr. Rudner: I haven't even been given a copy of the brief; I supplied mine.

Mr. Turtur: He supplied it to me just this morning. I had to go at random to find out what you were depending on so I looked up every conceivable point of law.

The Court: May I have the citation?

Mr. Turtur: Yes, page 29 of our brief. Louisville & Nashville R. R. Co. vs. Wright, 4 A. L. R. 478, 210 S. W. 184. At page 480 the court stated those are the facts and then the defendant contended that the answer traversed the [fol. 1266] allegations of the petition and in separate paragraphs pleaded assumed risk, contributory negligence, and that if plaintiff was injured, which was denied, it 'was not a probable consequence that would usually or ordinarily result from handling ties that had been treated with creosote oil,' but 'was due from some idiosyncrasy or peculiar susceptibility possessed by him, and which does not exist in the ordinary run of men,' and which was not known, and could not have been known by the exercise of ordinary care, by defendant. A reply traversed the allegations of the answer.''

The Court: What is this supposed to be for?

Mr. Turtur: I am referring your Honor now to the question of knowledge as to what the court said in the Louisville case.

The Court: You are not going to seriously contend that this defendant could be charged with liability unless they had reasonable knowledge?

Mr. Turtur: They should have had knowledge and notice, your Honor please, of the conditions that were existing at [fol. 1267] their plant and the reason I say that is because they bring in witnesses, Dr. Chaffe, if you will recall, your Honor, of the Solvay Process where they handle this soda ash, and there they provide, your Honor please, a ventilation system and they provide respirators. Then Dr. Pollak, he came here, your Honor please, and he stated that at the Colgate plant——

The Court: I didn't ask you to review the evidence, I asked you now for the cases on the question of knowledge. I have got three of them, and are there any closer than those three?

Mr. Turtur: Well, may I read to your Honor the specific language——

The Court: No. I am asking you for the cases so I may read them.

Mr. Turtur: Well, I say, your Honor please, that on the question of knowledge in the case of Louisville vs. Wright at page 40 of our brief——

The Court: Is closer than the ones I have? I wouldn't think so, from reading what you quote from it.

Mr. Turtur: Yes, your Honor. "The doer of the act"— [fol. 1268] May I read from 39 to 40, your Honor please?

The Court: I have read it.

Mr. Turtur: Well, may I refer your Honor to page 40 where it says: "The doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act."

The Court: That is not the point we are concerned with. We are concerned with the point of whether the defendant in this case should have known the substance was harmful under the circumstances of the case.

Mr. Turtur: I refer your Honor to the fact——

The Court: The only cases you have been able to give me are cases of manifest poisons like oxalic acid or sulphuric acid or dust——

Mr. Turtur: It doesn't go specifically to oxalic acid or any specific substance, your Honor please, it goes to the crux as to whether the subject or the matter that was being handled, whether they should have had some notice or knowledge by reason of handling this product for so many [fol. 1269] years as they did. Now, I say to your Honor that in the cases that Mr. Rudner cited—your Honor is very well acquainted, they had every conceivable kind of protection for the men, gave them respirators, required them to be worn and had a ventilating system. Over here, your Honor please, they have these kind of rash cases way back to 1920 and they have treated such cases of rashes way back to 1920 and yet, your Honor please, they did not adivse Matey at the time that he went to work there in 1928 to be careful, that some of these people have received rashes working in and about this department, and yet in spite of the fact that they did have this knowledge and did have notice of the substance which the other men were handling way back to 1920, your Honor please, they didn't put in any ventilating system nor did they supply the necessary appliances to have these men work in a safe condition, in the manner in which they were working. Now, with all of those years, your Honor please, and they not taking any reasonable care to inform themselves as to what might result—I refer your Honor to my page 18B, if you don't mind:

"It is the duty of the master to keep pace with scientific [fol. 1270] development and knowledge as it may affect the character of business in which he is engaged, and it is presumed that he has such knowledge", and that is the case of Mooney vs. Monark Gasoline & Oil, 298 S. W. 69, page 60 of our brief. "The employer is bound to become informed of those matters of scientific knowledge possessed by men of general education and information relative to the danger and hazard of the business in which he is engaged."

That is the case of Thompson vs. United Laboratories, 108 N. E. 1042.

"It is a common law duty" too, your Honor please, "on the part of the employer, to warn and instruct employees and furnish them with means to avoid inhaling elements that are injurious to their health."

That is Jacque vs. Locke Insulator Corp., 70 Fed. (2d) 680.

"Where there is reason to anticipate some injury may result to the servant, the master must exercise such care as will prevent the injury and the failure to do so is actionable negligence."

That is the case of Chicago, R. I. & P. RPY. Co. vs. Cheek, [fol. 1271] 231 Pac. 1078. There it was only an external injury, your Honor please.

The Court: Get me 5 Fed. Supplement, 507.

Mr. Turtur: Now, your Honor please, they certainly knew of the external injury in this case and that is what this Chicago vs. Cheek held. Then under the question of the duties further: "It is the duty of the employer to use reasonable care to maintain his premises in a safe condition——"

The Court: Don't give me truisms, don't waste time giving me truisms.

Mr. Turtur: All right. May I refer your Honor to page 44, in the case of Collins vs. Pecas—that is the case my adversary cited, in 173 S. W. 250. That was reversed as I told your Honor in 212 S. W. 77. That was where the injury complained of was handling creosoted ties. "It was assumed that the poisoning complained of was of a character not theretofore known, in that, instead of merely resulting in a burning sensation compared to a sunburn, and not of serious character, it produced constitutional disorders or systemic poisoning, due to the fact that the [fol. 1272] ties were handled when the creosote was wet." It went to the Court of Civil Appeals, Texas Civil Appeals, there it was reported in what Mr. Rudner gave you, "held that the defendant was not liable for the injury complained of, because it did not know and could not have known that a constitutional disorder might result from the handling of the ties, and such a result could not reasonably have been supposed to enter into the contemplation of the defendant. And it is said that evidence was lacking to show that such injury could or should reasonably have been anticipated, and that the defendant knew or should have known thereof." Now, upon this point, the court said: "The court of civil appeals is reversed, the higher court holding that the defendant's negligence in failing to inform the employee of the known danger—that is, of the external poisoning—rendered it liable for the injury complained of—that is, the systemic poisoning—in view of the finding of the jury in the trial court that the latter injury was the natural and proximate result of the defendant's original [fol. 1273] negligence. On this point, the court said: "We believe——"

The Court: This workman is getting compensation, isn't he?

Mr. Turtur: No, your Honor please, the Act doesn't provide for any compensation in his case.

The Court: Does not?

Mr. Turtur: No, sir.

Mr. Rudner: The Compensation Act fixes certain specific occupational diseases.

Mr. Turtur: That was for the wrenching of the wrist, your Honor please, if you recall, and way back they gave him some temporary help for a condition he had of dermatitis.

The Court: What would the schedule be to which he would be entitled?

Mr. Rudner: Mr. Geuther is more familiar with the Compensation Act than I am.

Mr. Geuther: May I say that under the Compensation Act there is no proof——

The Court: I understand, as now written, of course. That is very unfair and very unsocial.

Mr. Geuther: We paid him for his dermatitis.

[fol. 1274] The Court: I am not talking about his dermatitis; he has abscess of the lung.

Mr. Geuther: That, of course, we never paid anything for. I don't know that there is any schedule I could get.

The Court: It is a disability.

Mr. Geuther: But not occupational. We have no schedule by which to guide that.

The Court: No, I wasn't asking that. The man is disabled due to a disease which he contracted——

Mr. Rudner: That is the question.

The Court: —while working for you.

Mr. Rudner: That is the fundamental part of this case. We deny it. Even if the Workmen's Compensation Act were applicable, you would still have the question as to whether his inqury was sustained in and arose out of the course of his employment.

Mr. Rudner: Of course, if the Compensation Act applied and we prove, your Honor please, that he was one hundred per cent disabled, then the Compensation Act would so apply, he being one hundred per cent disabled.

The Court: What would he get?

[fol. 1275] Mr. Geuther: Five hundred weeks at 66-2/3 of his rate.

The Court: How much would that amount to?

Mr. Geuther: I imagine that would amount to $15 a week for 500 weeks or $7500, something in that neighborhood.

Mr. Turtur: Plus, however, that if the man died and the action were brought, children up to the age of 16 would be entitled to be compensated until they became that age, and the widow would be entitled to funeral expenses and other expenses that he may have incurred plus the reasonableness of the counsel fees and plus reasonable medical fees and bills that they were subjected to or made themselves liable to pay by reason of trying to cure this man. But that's the point, your Honor please, the only place where we can apply and where we can appeal to is to the courts of justice here. The Compensation Act does not provide it. Where can we go?

The Court: That's all he will get anyway, isn't it?

Mr. Turtur: Well, do you mean if the Compensation law applied?

The Court: He won't get more than that now, will he?

[fol. 1276] Mr. Turtur: I don't understand what you mean.

The Court: I think you do.

Mr. Turtur: You mean as to what he ultimately would get, your honor please?

The Court: I do.

Mr. Turtur: But as I say, your honor, here is a case where if the Workmen's Compensation Act provided the necessary help to this man then of course we would have the proper tribunal to go to and there we wouldn't have had to show the necessary elements that we had to show here, but the only place that we can go to is before the courts of justice. And where they just throw these men around with these working conditions as they do like a lot of cattle so to speak——

Mr. Rudner: That is very unfair and improper; these people are human beings.

The Court: Do you treat them any better?

Mr. Turtur: Why, I most assuredly would, your Honor please. I would at least try to find out how deteriorating, how bad that substance was when they had been treating these cases from 1920.

[fol. 1277] The Court: Yes, and take half of what they got for it.

Mr. Turtur: Well, I wouldn't take half of what they got for it.

The Court: Forty per cent is what you told me.

Mr. Turtur: Yes, but your honor please——

The Court: That's nearly half.

Mr. Turtur: I know, but your honor please, there has been quite a tremendous amount of work in this case and expenses galore; therefore I would at least, your honor please, try to find out what the substance was that they were handling, try to find out way back in 1920 that in view of the fact that it is giving this kind of a rash and this kind of a condition to other men, "Let me see, do I need some kind of a respirator that I can give to these men? Do I need some kind of devices that I can give him to protect him for his health? Do I need some kind of ventilators here so as to take out this powder?" None of that was done in spite of the knowledge that they had way back in 1920. And isn't it significant too, your honor please, that we do not produce witnesses from other like industries and then [fol. 1278] they do produce these gentlemen from the Solvar Process in which they do state that they give them respirators, in which they do state that they do have a ventilating system and then when Dr. Pollak says they have to use a respirator at the Colgate plant because they were using this soda ash.

Mr. Rudner: He didn't say soda ash; he didn't know what they did.

Mr. Turtur: He said anything that was irritating to the skin was irritating to the lungs and then they produce this Dr. Smyth, a man——

Mr. Rudner: They don't use respirators in Solvar Process; please don't make misstatements of fact. The jury isn't here now so you can give the facts accurately.

Mr. Turtur: I didn't interrupt you, Mr. Rudner, except when you tried to cite a case that was reversed.

Mr. Rudner: I am sorry.

Mr. Turtur: That is the only time I interrupted you.

Mr. Rudner: Proceed. Go ahead.

Mr. Turtur: Professor Smyth, your honor please of the University of Pennsylvania, your honor will recall that I [fol. 1279] asked him but one or two questions and the one germane question was, I said, "Doctor, isn't it true that anything that is deteriorating or irritating to the skin is irritating to the lung?" And he retorted—I do not have the exact words from the testimony—but he does say "It is not only so but a lot greater irritating to the lung when a person inhales such fumes. And then he goes on further to state, on further questioning, I think by the court, or a voluntary statement, that a man inhales a certain amount of it, exhales a certain amount of it and a certain amount of it is retained and it is irritating to the mucous membrane and to the lung. Now, certainly that goes to the question of whether they have this knowledge or should have had this knowledge. May I refer, your honor please, to page 45 of our brief as to the specific language of the court in the case of Collins v. Pecos that was reversed, where the court said: "We believe that the correct rule for determining negligence is that where there is reason to anticipate, from the character of the services required and the manner of their performance, some injury may result to the serv- [fol. 1280] ant, the duty is incumbent to exercise such care demanded by the relationship as will prevent the injury, and the failure so to do becomes actionable in the event injury follows the breach of duty. We are not willing to subscribe to the rule that requires the master to anticipate all ensuing results which flow from the breach, before duty arises to exercise care to prevent the consequences. Anticipation is applied in the determination of negligence vel non. If no injury may be anticipated, no duty is breached by a failure to exercise care; but, if anticipated injury may result, then the duty arises. Negligence rests primarily upon two elements: First, reason to anticipate injury; and second, failure to perform the duty arising on account of that anticipation. Negligence may exist abstractly; but to render it actionable, it must be concretely incorporated into some injury. Anticipation of injury, as applied in the determination of negligence and proximate cause, should not be confused. The former is an element of negligence, while the latter is used to denote the relative position of cause to effect, in ascertaining whether cause is so related [fol. 1281] to effect as to bring negligence in union with the result, rendering liable a negligent actor for certain consequences. Whether a result can be chargeable to a certain dominant cause is determined by ascertaining whether the result flows naturally, without lapse, from the cause, although there may be intervening ancillary or subsidiary causes which contribute to the injury. Proximate cause incorporates in it such anticipation of results as ought, from the circumstances, to have been foreseen as the natural consequences flowing from a negligent act. Where some injury has resulted, chargeable to negligence, later followed by serious consequences, to ascertain these consequences proximately flow from the negligence, it is always necessary to look back down the line for causation; and if the consequences naturally flow from the negligence, without the intervention of any independent cause, such consequences ought to have been foreseen, and are chargeable to the original negligent act. Or, on the other hand, if the negligent act produces an injury, and, looking down the line to the future, it can be ascertained that other and more [fol. 1282] serious injuries will naturally flow from the negligence, without any intervening independent cause, these consequences are probable, and ou-*th* to be foreseen, and are chargeable to the negligence." That is the Pecos case that reversed the lower court.

Now, on the question, your Honor please as to whether or not under the general rule, your Honor please, which I gave your honor in 22 R. C. L. at page 86 there the general rule is stated thus—you don't want it?

The Court: Certainly not, counsel; I am familiar with the general rules of law.

Mr. Turtur: Yes, I appreciate your Honor is, but I just wanted to answer your question as to the specific question where they state, if you want me to read it, your Honor: "When there is danger of a particular injury which actually occurs, we must surely say that is the usual, ordinary, natural, and probable result of the act exposing the person or thing injured to the danger." Then it goes on: "The result seems to be that, when the act complained of was such that, in view of all the circumstances, it might not im- [fol. 1283] probably cause damage of some kind the doer"—here is a very important statement, your Honor please, which states; "The doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act. To hold so would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or become familiar, the defendant would be liable."

Now, the very first case that I give your honor on page 22 of our brief, Voshall v. Northern Pacific Terminal Co., 240 Pacific, 891, Mr. Rudner,—there the plaintiff was employed by the defendant in polishing brass trimmings in Pullman and observation cars. The defendant manufactured and furnished the plaintiff with a certain mixture.

The Court: Is that an industrial disease case?

Mr. Turtur: Yes, your honor, surely; the plaintiff said it caused——

[fol. 1284] The Court: Did the man work in the factory?

Mr. Turtur: No, but he used this particular substance, your Honor please, and it gave off dust and they also stated in that case, the defendant said "Why, men have worked at this from two months to eight years."

The Court: I admonish you, Mr. Turtur, when you do argue in the Court of Appeals, if you do argue there, that you confine yourself to cases in point, and that you give more careful consideration to which are in point, because you will find that court, if you try to impose upon them with cases that have no more to do with it than the Scheck case, resent it.

Mr. Turtur: I shall certainly take your honor's advice, and I don't mean to be disrespectful when I try to read these cases to your Honor. This case here refers to that Pinkley case which Mr. Rudner spoke about and they also say that there has never been a case like this before, men have worked from two months to eight years in handling this powder and never before have we ever had such a thing and there the court said—there the plaintiff, your Honor please, suffered from the inhalation of this dust [fol. 1285] which the polish would give off and fly in a dust form—there the plaintiff said it caused a severe burning sensation to his throat and about his lungs. Plaintiff said he became short of breath and experienced smothering spells and was unable to walk any distance on account thereof. He also said that when the polish was upon his hands, that it would make the ends of the fingers sore. Now, expert medical witnesses called by the plaintiff to testify, in substance said that the oxalic acid in solution is volatile, and that its fumes have a particularly depressant effect upon the heart; that it is an irritant and when inhaled affects the lungs, throat and bronchial tubes; an expert testified that in his opinion the use of this brass polish——

The Court: Again that is oxalic acid. Your Welch case is closer than this one.

Mr. Turtur: Very well, if your honor doesn't want it.

The Court: What is the point of it?

Mr. Turtur: The point is to show that this gave it off in the way of a dust and while given off in dust he inhaled it and he suffered all of these other things. And then very [fol. 1286] significantly, your honor, please, the Court held, unless your honor——

The Court: No, I don't want to hear that case any more. You have one case of oxalic acid and it is closer than that one.

Mr. Turtur: Well, it is merely distinguishing, your honor please, the Pinkley case to which they refer at page 28 and which they call very, very harsh law; and that Pinkley case, three judges dissented, your honor please. At page 28 they quote from the Louisville case: "We are unable to agree to such a conclusion. It is, indeed, a harsh doctrine to hold as a matter of law that such dangers were obvious to a common laborer.——"

The Court: Oh, of course that isn't involved.

Mr. Turtur: Well, but he read the Pinkley case, your Honor please, and I just want to show your Honor——

The Court: If the Pinkley case went off on the assumption of risk I am not interested in it.

Mr. Turtur: It went off on that, yes. Now, your Honor please, as to the—I have a lot of other matters that I could read to the court. We have a tremendous amount of citations.

[fol. 1287] The Court: Most of which are not in point.

Mr. Turtur: Well, I respectfully state to the court that the reading of those cases verbatim as we have read them, certainly leads to the conclusion in my humble opinion that they are in point with ours, supporting as to the facts and the law in the case; otherwise, I certainly shouldn't have burdened your honor in giving you a lot of needless citations. Now, I have at that page 18, your honor please, under the question of duty, there are a lot more matters that could be called to your honor's attention.

Now, as to the question of the verdict being rendered for the defendant instead of the plaintiff, your honor please——

The Court: I don't have to concern myself with that.

Mr. Turtur: All right. Now, the Grammer case, does your honor want me to give you a distinguishment on that? That Grammer case, your Honor recalls, there was one dissenting opinion from three judges and the expert for the plaintiff himself stated that the dust to which Grammer was exposed was less harmful than ordinary house dust. The Pulverizing case with which your honor is very, very well [fol. 1288] familiar and which Mr. Rudner relies so very strongly upon, Mr. Rudner, forgets the fact that the Vice-President of that company, and as your honor very well remembers, went himself to every jurisdiction or every state or every place where he could find an industry where they were in a manufacture and where they evolved these dusts and after making the close examination of all of the conditions around these plants and seeing what was current, he installed the latest equipment possible, even going beyond that which was provided for by the Departments or any other plants and there they also had given Butler, as your Honor well remembers the respirator, with a warning and an instruction to him to wear it. So that certainly isn't our case. Now, does your honor want me to go into the question of special susceptibility or the idiosyncracy?

The Court: No.

Mr. Turtur: Your honor certainly also knows that the defendant is presumed to have knowledge of all the latent as well as patent conditions or properties of the substances which they handle or which they manufacture and that is reported, your honor please, in Smith v. Osford Iron Company, 42 N. J. Law 467, where it says that the employer [fol. 1289] owes a duty to the employees to ascertain and make known its properties and the mode of using it to the plaintiff. Whether the company was aware of its dangerous quality, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company was bound to perform, to see that such reasonable care as the exigency of the case demanded, was taken, and to impart to the subordinates full information as to the manner of applying the new compound, before placing it in the hands of an ignorant laborer."

Now, in conclusion, your honor please, I would like to state that in view of the fact that these people had this notice and knowledge of what was occurring to some of their men way back in 1920, and all the way down to when Matey was there, in view of the further fact that this company was a chemical company and certainly should have informed itself of the resulting effects that might occur since they did not use the ventilating system nor did they give any respirators or instruct these men or give them any notice or warning of any kind that this might become dangerous to them, in view of the fact that the Compensation Act does not apply in this case, there is only one [fol. 1290] tribunal, your honor please, or rather one forum that we can go to.

The Court: That is not an argument and you know it.

Mr. Turtur: Yes, I know that.

The Court: Well, don't make it, please.

Mr. Turtur: I merely state that, in conclusion, your honor please, that now I wonder if your honor will look at page 55 of my brief with reference to the case of Kane v. Federal Match.

The Court: I have it before me.

Mr. Turtur: 5 Fed. Supp. 507. These people were in the chemical business, your Honor please and therefore certainly should have informed themselves as to what might occur.

The Court: Supposing they tested this soda ash and the soda ash tests had shown that the soda ash was not injurious to the tissues——

Mr. Turtur: But there was no proof, your honor please.

The Court: Supposing they had; then what would you say?

Mr. Turtur: May I have the question specifically?

(Repeated by the reporter.)

Mr. Turtur: Well, I would say that that test would not [fol. 1291] be a proper one because the test was made after and it was definitely shown, your honor please——

The Court: Then on your theory they couldn't possibly avoid liability if anybody obtained a lung abscess no matter how much knowledge they had.

Mr. Turtur: No, but I say this, your honor please; in view of the fact that they are in this chemical business——

The Court: I said, supposing they had the soda ash tested and the test showed that soda ash was not, as your expert tried to make out, sodium hydroxid but the other and less hydroxyl element, what would you say then?

Mr. Turtur: Well, it still would be a question for the jury to decide, your honor please, if we maintain one thing with experts and they maintain another.

The Court: I didn't say that: supposing they had a test made and the test showed it was a harmless substance; could they be charged with notice that it was harmful?

Mr. Turtur: Well, there was no proof of that in this case.

[fol. 1292] The Court: I am just putting it to you.

Mr. Turtur: Yes, but if they had that kind of a test and they showed that, then how could we rebut it excepting to bring in experts to state that their tests showed that it was contrary. Now, there is absolutely no proof in this case, way back in 1920 that they ever made such a test. As a matter of fact Mr. Davis, the mechanical engineer for this company, agrees what the substance really is and he says it was an alkali and he says it was an irritant; their own chemists agree to that; your Honor please, and the dusts shown in this court certainly showed that it was an alkali when this soda ash came into contact with water and produced these hydroxyl ions and when these hydroxyl ions were present then the effect was there, that it as to the irritating substances and may I refer your Honor—I was very fortunate in finding it in the case of Zajkowski v. American Steel, that I cite to your Honor on page 48, 258 Fed. 9 where Dr. Thompson in his recent work says, your Honor please, "that occupational disease may be defined as maladies due to specific poisons, mechanical irritants, physical and mental strain [fol. 1293] or faulty environment, resulting from specific conditions of labor. They arise from a great variety of poisons, irritating substances, and exposure, due to unusual physical conditions." So that if there had been proof in this case that they had made these tests as soon as they became aware that this powder did produce these deleterious effects upon the people's skins since 1920, why they certainly —and then we came in and said that it wasn't so or produced other testimony, if we could have by showing other tests, then of course it would become a question of fact. But there certainly is no evidence in this case that they ever made tests or ever even made periodical inspections to become informed as to what might ultimately happen; because when Mr. High was on the stand, your Honor please, your Honor remembers that I asked him how many cases they had treated from 1920 to 1925 and then from 1925 on; yet they didn't bring any evidence in here or show any records how many they had really treated. He did say "We treated numerous cases, but how many they did not know." Now, as long as they treated those numerous cases and the number of cases as they did——

[fol. 1294] The Court: That's all.

Mr. Turtur: Very well, your Honor.

Mr. Rudner: Just a certain few significant things. I will be very brief. Dr. Oleynick, outstanding skin specialist was called and when this man Matey claimed that the rash on the arms and the groin was due to the dust, actual tests were made of the powders that he brought and proved to be negative with respect to those powders, and Dr. Oleynick finally concluded that the man was suffering from a ringworm or something. Your Honor will recall further in reference to the tests, your Honor called Dr. Wiener as an independent chemist. I can still see Dr. Wiener sitting on that stand. He was being asked the question——

The Court: I don't place any value in Dr. Gettler's testimony whatever.

Mr. Rudner: But Dr. Wiener—I am talking about Dr. Wiener now, he is the gentleman your Honor called in—I can still see Dr. Wiener——

The Court: I mean his testimony as he originally gave it concerning sodium hydroxid, that was thoroughly disproved.

Mr. Turtur: Well, Dr. Wiener admitted it.

[fol. 1295] The Court: Now, Mr. Turtur?

Mr. Turtur: I beg your pardon.

Mr. Rudner: Counsel talks about these numerous cases of injury. What cases of injury were there? Dr. Chaffe testifies—I remember his using the word "Mechanical"—that in summer time they had an irritation around the wrists of a mechanical nature attributable to the rubbing of the sleeve against the skin in hot weather when there was a little dust there, something that will happen to me, something that will happen to any of us, a matter that when it does happen brings about boils, the irritation of the collar rubbing against the neck brings on boils and this man had a boil too as a matter of fact. But outside of the slight irritation around the wrist, there is no suggestion of any injuries;

as a matter of fact six or seven employees came here, most of them produced by the plaintiff, the pictures of health, and even those men had only casual experiences, perhaps once in ten years, one man that I recall, or irritation. Men are actually brought here from this plant the picture of health, no single fundamental injury, no injury whatsoever except at one time they may have experienced an irritation around [fol. 1296] the wrist.

The Court: All right, I will announce my decision at two o'clock.

Mr. Rudner: Yes, and Dr. Oleynick says, "I applied to his body, to a small surface, the ingredients he was working with and found them negative."

(Recess.)

Afternoon Session.

(At side bar.)

The Court: Would your company be willing to pay this man disability rates of compensation?

Mr. Geuther: I am sorry, Judge; we have discussed that possibility; we have been influenced by our opinion that this condition is not at all due to the conditions that existed in the plant and for that reason we cannot pay on a claim that we feel is not meritorious. His claim was started by other counsel and dropped by them with that thought possibly in mind, I don't know. But already this case has had its ill effect because Mrs. Virchek whose name was mentioned in the case; she has been in demanding settlement. It is going [fol. 1297] to create a precedent. We have got to take the position that we cannot——

The Court: Well, my view of the matter is that your plaintiff hasn't got a chance of winning in the court of appeals in my view of the matter; there isn't sufficient knowledge attributable to the defendant in this case, not to go into any of the other phases of the matter. The cases that you cite are very much stronger in their attributing knowledge to the defendant, apart from the doubtful question of whether or not the actual disease was caused and the other doubtful question of whether you can conceivable say that there was enough soda ash exposure in the outside plant where he was working.

Mr. Turtur: Phosphate plant.

The Court: Phosphate plant where he was working. Now, for that reason I think that you will have to take the burden of an appeal. If the appeal is decided against you, I will do my best to bring pressure on this company to give the plaintiff in this case—I mean legitimate pressure—to give the plaintiff in this case disability payments which he would have had if the case was covered by the Compensation Act, [fol. 1298] which as a matter of fact would amount to as much as he will get now.

Mr. Turtur: But your Honor, please——

The Court: So that I will have to direct a verdict in favor of the defendant.

Mr. Rudner: You will be in town tomorrow?

The Court: I wouldn't do that if I thought you had one chance in a hundred.

Mr. Turtur: Well, your Honor please, in view of the present circumstances of the case, I don't think your Honor has the authority under the cases and under the rules, to direct a verdict.

The Court: You agreed to it before we commenced the argument.

Mr. Turtur: Oh, I see, but——

The Court: Because otherwise—and that is in your favor, because otherwise you have to go through the expense of another trial.

Mr. Turtur: Yes, but here is the thing, your Honor please; when you say it is problematical as to whether or not he was exposed to a sufficient amount——

The Court: I said so; that is just my opinion, but I don't place my decision on that ground. I place it on the ground [fol. 1299] that I am satisfied that there is not sufficient knowledge attributable to this company under the rule of the cases in the Third Circuit on the subject.

Mr. Turtur: What cases do you refer to, your Honor please?

The Court: I am not going to reargue the case, Mr. Turtur.

Mr. Turtur: No, I mean what cases specifically?

The Court: I am not going to reargue the case.

Mr. Rudner: So your Honor is directing a verdict in favor of the defendant?

The Court: And you may bring in the necessary papers.

Mr. Rudner: Will you be in town tomorrow so we can present a rule?

The Clerk: Rule for judgment setting aside the verdict and granting a new trial?

The Court: No.

The Clerk: That is the motion.

The Court: Do I have to explain it all over again? I will direct a verdict in your favor and Mr. Turtur can appeal from it.

[fol. 1300] Mr. Rudner: There may be some papers of record now.

The Court: We can abrogate them in order to save everybody concerned expense, that's all.

Mr. Turtur: Well, now, I don't know how we are going to bring this up, your Honor please, from the standpoint of the ability to pay for the record.

The Court: I don't believe you have the slightest chance; I have been trying to convince you of that, Mr. Turtur all through this case.

Mr. Turtur: Well, but your Honor is taking the prerogative of the jury.

The Court: That is your view of it.

Mr. Turtur: Because after all——

The Court: You have your right of appeal.

Mr. Turtur: Yes, I know that.

Mr. Geuther: May I say this to your Honor, in response to a suggestion that your Honor made to me? I have no authority to speak for this, but I shall at least after this case has been finally disposed of, bring it to the attention of the Employees Association with an attempt to satisfactorily take care of this plaintiff in any way that they see fit. I won't let the matter drop at this point.

[fol. 1301] The Court: I am most sympathetic with the man; I think he suffered an injury, possibly in the course of his employment, anyway while working for this plant he was injured or he became ill; therefore I think that any fair minded employer would want to pay him his compensation which as I say is all he would get anyway under the circumstances of the case. However, that does not justify me in deciding in favor of the plaintiff who, I am satisfied beyond not only a reasonable doubt, but to a certainty, has no chance of sustaining the legal contention.

Mr. Turtur: I take an exception to your Honor's ruling.

Plaintiff's counsel prays an exception which is allowed and sealed accordingly.

William Clark. (Sealed.)

The Court: I expect to hear from you after the decision on the appeal.

Mr. Geuther: Absolutely, Judge; I give you my word.

The Court: However, if you lose the case, that's different.

[fol. 1302] Mr. Geuther: As I say, I have no authority to say at all.

Mr. Turtur: May I ask your Honor please that the other side be so kind as to furnish me with transcript because it costs $750 and this man hasn't got it?

The Court: I said to you before that I had no power to do that.

Mr. Rudner: Mr. Turtur, you will find me the most reasonable man in the world. I will help you with the appeal papers. I will do everything to expedite it in whatever way I can.

Mr. Turtur: I don't know whether you were joking, you said if the matter went in your favor you would let me have the record at your cost; now it costs $750; we don't have the money to do it. Why don't you loan it to me and I will return it to you after the case is printed.

Mr. Geuther: I feel that is going too far. We cannot prejudice our preparation of the case by letting out of the office the only copy we have in order that he may prepare the brief against us.

Mr. Rudner: I say I have no power, Mr. Turtur.

Mr. Turtur: I was under the impression, your Honor [fol. 1303] please, that the procedure would be followed the same as in our Supreme Court where a rule to show cause requires——

The Court: We have no such rule.

Mr. Turtur: I had heard from other lawyers off hand that whenever a rule was given or signed by the court, that a copy of the transcript was furnished.

The Court: Not in this court; you said that before and it isn't so.

Mr. Turtur: Well, I haven't been able to find it in the written rules. I am wondering whether that has been the practice.

The Court: No.

Mr. Turtur: As long as you have the record——

Mr. Rudner: We will take it up and I will let you know.

The Court: If I were giving you advice Mr. Turtur and you really wanted to serve your client I would abandon the appeal and see if the company wouldn't take care of him. I gave that advice to Mr. Greenstone in the Butler Case but he didn't take it with somewhat unfortunate results to the plaintiff.

Mr. Turtur: I think our case is somewhat different.

The Court: That's what Mr. Greenstone said.

[fols. 1304-1305] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 1306] IN SUPREME COURT OF NEW JERSEY, UNION COUNTY

SUMMONS.

To The Grasselli Chemical Company, a Corporation of Delaware, Duly Authorized to Transact Business in the State of New Jersey:

(L. S.)

You are summoned to answer the annexed complaint of George Maty, also known as George Matey, in an action at law in the New Jersey Supreme Court, Union County. And take notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court of the State of New Jersey, at Trenton, New Jersey, within twenty (20) days after service upon you of this writ and the annexed complaint, plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Thomas J. Brogan, Esquire, Chief Justice of the Supreme Court of the State of New Jersey, at Trenton, this first day of October, in the year of our Lord, One Thousand Nine Hundred and Thirty-five.

Fred L. Bloodgood, Clerk.

Mario Turtur, Attorney for Plaintiff.

[fol. 1307

IN SUPREME COURT OF NEW JERSEY, UNION COUNTY

Action at Law.

GEORGE MATY, Also Known as GEORGE MATEY, Plaintiff,

vs.

THE GRASSELLI CHEMICAL COMPANY, a Corporation of Delaware, Duly Authorized to Transact Business in the State of New Jersey, Defendant.

COMPLAINT.

Plaintiff residing in the City of Linden, County of Union and State of New Jersey, complaining of the above named defendant, says that:

1. The plaintiff was in the employ of the defendant in the month of November, 1933, and for sometime prior thereto at defendant's plant in Grasselli, County of Union and State of New Jersey.

2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate Department of defendant's plant.

3. It was the duty of the defendant to use reasonable diligence to protect the plaintiff from unnecessary dangers or risks, and provide plaintiff with a reasonable safe place to work.

4. During the course of his employment in and around the said department, he necessarily came into close contact with metallic, mineral, gas and/or other injurious substances caused through the operations of the defendant, and plaintiff was exposed to and forced to inhale and breathe in the said metallic, mineral, gas and/or other injurious substances, with the result that he became diseased, sick, poisoned, and his internal organs, particularly his [fol. 1308] lungs, were affected and weakened, so as to cause him to suffer with a disease; all of which was the result of the negligence of the defendant; so that in November, 1933, he became incapacitated for work.

5. The negligence of the defendant consisted in this:—(a) in failing to provide the plaintiff with a safe place to work; (b) in failing to provide the plaintiff with adequate

and sufficient protection or appliances or safeguards in his said work; and (c) in failing to provide a proper ventilation system in the plant.

6. The defendant had knowledge of the dangerous effect of the inhaling and breathing in of any of the said substances aforementioned, and the plaintiff was ignorant of their danger.

7. By reason of the disease contracted through the negligence of the defendant, the plaintiff suffered and underwent, and in the future will suffer and undergo great physical pain, nervous shock and mental anguish and lost and was deprived of, and in the future will lose and be deprived of work, gains, profits and advantages which he might and otherwise would have acquired, and was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs, by him during all that time to be performed and transacted, and was forced and obliged, and in the future will be forced and obliged to lay out and expend divers large sums of money in and about endeavoring to be cured of the disease contracted as aforesaid.

Plaintiff demands as damages of the defendant, the sum of one hundred thousand ($100,000) dollars, plus costs of [fol. 1309] suit to be taxed.

Mario Turtur, Attorney for Plaintiff.

Dated October 1st, 1935.

[fol. 1310] Oct. 3, 1935—Served the Grasselli Chemical Company, a corporation of Delaware, duly authorized to transact business in the State of New Jersey, by handing a true copy to Charles Langstaff, Assistant Superintendent, at the place of business, of defendant company, Trembley Point Rd., Linden, N. J.

C. Wesley Collins, Sheriff, by Maurice Hagui, Spec. Deputy Sheriff.

Received Union County Sheriff's Office, Oct. 2, 11:24 A. M. 35.

I hereby deputize and appoint Maurice Hagui Special Deputy to serve the within writ.

Witness my hand and seal this 2 day of Oct. A. D. 1935.
C. Wesley Collins, Sheriff of Union County.

[fol. 1311] IN SUPREME COURT OF NEW JERSEY, UNION COUNTY

[Title omitted]

NOTICE OF FILING PETITION FOR REMOVAL AND BOND, AND OF APPLICATION FOR ORDER OF REMOVAL.

To the Above Named Plaintiff and Mario Turtur, Esq., His Attorney:

Take notice that the Grasselli Chemical Company, the defendant in the above entitled action, will on October 22, 1935, file in the New Jersey Supreme Court and with the Clerk thereof, in which Court the above entitled action is now pending, its duly verified petition for the removal of this cause to the District Court of the United States, for the District of New Jersey, and a bond with good and sufficient surety, as provided by law, and that on Tuesday, October 22nd, 1935, at 9:30 o'clock in the forenoon, or as soon thereafter as the matter can be heard, we, appearing specially for that purpose, shall apply to the Honorable Clarence E. Case, one of the Justices of the New Jersey Supreme Court, at the Union County Court House, Elizabeth, New Jersey, for an order removing said cause to the United States District Court, for the District of New Jersey.

Dates October 15, 1935.

Katzenbach, Gildea & Rudner, Attorneys for the Grasselli Chemical Company, Appearing Specially.

[fol. 1312] Service of the within Notice is hereby acknowledged this 16th day of October, 1935.

Mario Turtur, Attorney for Plaintiff.

[fol. 1313] IN SUPREME COURT OF NEW JERSEY, UNION COUNTY

[Title omitted]

PETITION FOR REMOVAL

The petition of The Grasselli Chemical Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware and having its principal place of business in the City of Wilmington, in the State of Delaware, respectfully shows:

1. The summons and complaint in this action were served upon the petitioner on October 3, 1935.

2. The plaintiff herein is a resident and citizen of the City of Linden, County of Union and State of New Jersey, and his action is now pending in this Court.

3. Petitioner, who is the defendant in this cause, is a corporation, citizen and resident of the State of Delaware, having its principal office in the City of Wilmington, in the State of Delaware, and is not a citizen or resident of the State of New Jersey.

4. The matter and amount in dispute in the above entitled action exceeds the sum or value of $3,000 exclusive of interest and costs.

5. The controversy in this cause is, and at the time of the commencement of this suit was, between citizens of different States. The plaintiff, George Maty, also known as George Matey, was at the time of the commencement of [fols. 1314-1316] this suit and still is a resident and citizen of the State of New Jersey, residing in the City of Linden, in the County of Union. The defendant, the Grasselli Chemical Company, was at the time of the commencement of this suit and still is a resident and citizen of the State of Delaware, having its principal office in Wilmington, Delaware, and was not and is not a resident and citizen of the State of New Jersey.

6. No special bail has been required in this suit.

7. Your petitioner has given to the adverse party due written notice of its intention to file this petition for removal and bond, as required by law, prior to the filing of the same.

8. No previous application for removal of this suit has been made to any Judge or Court.

9. Your petitioner herewith files a good and sufficient bond under the statute in such case made and provided, conditioned as the law directs, that it will within thirty days from the filing of this petition for removal file a certified copy of the record in this cause in the District

Court of the United States for the District of New Jersey, and will pay all costs that may be awarded by said Court if said Court shall determine that this suit was improperly or wrongfully removed thereto.

10. Your petitioner, therefore, prays that this Court proceed no further herein, except to approve and accept the bond herewith presented, and to order the removal of this cause to the District Court of the United States, for the District of New Jersey and direct the transcript of the record to be made and certified as provided by law.

Dated, October —, 1935.

The Grasselli Chemical Company, by —— ——, President. Petitioner, Appearing Specially. —— ——, Attorneys for Petitioner, Appearing Specially.

Attest: —— ——, Secretary.

[fols. 1317-1320] Bond on removal for $500.00 omitted in printing.

[fols. 1321-1322] IN SUPREME COURT OF NEW JERSEY, UNION COUNTY

[Title omitted]

ORDER FOR REMOVAL.

A petition for an order removing the above entitle- cause to the District Court of the United States, for the District of New Jersey, coming on regularly to be heard, and it appearing to the Court that said petition and a bond duly conditioned and with good and sufficient surety, as provided by law, were filed in this Court within the time allowed to plead or answer, and that before the filing of said petition and bond, notice of the intention to file the same was duly served on the plaintiff, and it further appearing that there is proper cause for removal of this action to the United States District Court, for the District of New Jersey;

It is on this 22nd day of October, 1935, on motion of Katzenbach, Gildea & Rudner, Attorneys for the defendant, appearing specially, ordered that the bond filed by the defendant in this cause be and the same is hereby accepted and approved both as to form and sufficiency, and that this cause be and it hereby is removed to the District Court of the United States, for the District of New Jersey, and the Clerk of this Court is hereby directed to make up and certify the record in said cause for transmission to the said District Court of the United States, for the District of New Jersey forthwith.

Clarence & Ease, Justice of New Jersey Supreme Court.

Entered October —, 1935.

On motion of Katzenbach, Gildea & Rudner, Attorneys for Defendant, Appearing Specially.

[fol. 1323] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

Defendant, The Grasselli Chemical Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware and having its principal office in the City of Wilmington, in said State, answering the complaint herein filed says that:

1. It admits that the plaintiff, known to it as George Matey, was for a time employed by it at the place mentioned in Paragraph One but denied that plaintiff was in its employ in the month of November 1933.

2. It admits that the plaintiff was for a time employed as a furnace man in the silicate department of defendant's said plant but denies that he was employed in said department after November 1, 1932. It denies all other matters alleged in Paragraph Two.

3. It denies that it violated any duty which it owed to the plaintiff in any respect whatever.

4. It denies Paragraph Four.

5. It denies Paragraph Five.

6. It denies Paragraph Six and especially denies that plaintiff was caused to breath- or inhale any of the sub- [fol. 1324] stances mentioned in the complaint and denies that the plaintiff was subject to any danger.

7. It denies Paragraph Seven.

Defendant denies that plaintiff is entitled to damages against it in any sum whatever.

First Separate Defense

If the plaintiff suffered any injury while in the employ of the defendant (which is denied) he was guilty of negligence contributing to such injury in that he failed to use reasonable care for his own safety.

Second Separate Defense

If the plaintiff suffered any injury while in the employ of the defendant (which is denied) the risk of such injury was assumed by the plaintiff.

Third Separate Defense

If the plaintiff ever had a cause of action against the defendant by reason of the facts alleged in the complaint (which is denied) said cause of action did not occur within two years next preceding the commencement of this action and is therefore barred by the statute in such case made and provided.

Fourth Separate Defense

As to any breach of duty on the part of the defendant alleged by the plaintiff to have occurred more than two years prior to the commencement of this action, the defendant pleads the two year Statute of Limitations in cases of personal injury made and provided, and says that for such breach or breaches of duty plaintiff cannot recover damages from the defendant.

Fifth Separate Defense

If any of the breaches of duty alleged in the complaint [fols. 1325-1326] were committed against the plaintiff (which is denied) such breaches of duty were committed by a fellow servant or fellow servants of the plaintiff, and the defendant is not liable therefor.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1326-a] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF TRIAL

SIR:

Please To Take Notice that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the Third Tuesday of January A. D. 1936, at the Court House, in the City of Newark, New Jersey, in and for the County of Essex at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated December 21st A. D. 1935.

Mario Turtur, Attorney of Plaintiff.

To Katzenbach, Gildea & Rudner, Esqs., 1112 Trenton Trust Bldg., Trenton, N. J., Attorneys of Defendant.

Service of the within Notice of Trial is hereby acknowledged this 23rd day of December, A. D. 1935.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1327] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY

Plaintiff replying to the defendant's Answer, says that: He joins issue with all matters denied by the defendant.

Reply to First Separate Defense

Plaintiff denies that he was guilty of contributory negligence.

Reply to Second Separate Defense

Plaintiff denies that he assumed the risk of any injury.

Reply to Third Separate Defense

That the plaintiff's cause of action occurred within the Statutory Limitation and therefore is not barred.

Reply to Fourth Separate Defense

That the breach of duty on the part of the defendant occurred within the Statutory Limitation and therefore plaintiff is not barred.

[fols. 1328-1329] Reply to Fifth Separate Defense

Plaintiff denies that any breaches of duty were committed by fellow servant or fellow servants of the plaintiff.

Mario Turtur, Attorney of Plaintiff.

[fols. 1330-1331] IN UNITED STATES DISTRICT COURT

[Title omitted]

REJOINDER

By way of rejoinder to the reply filed herein defendant says:

1. It denies the allegations contained in the Replies to the Third and Fourth Separate Defenses.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1332] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMAND FOR BILL OF PARTICULARS

To Mario Turtur, Attorney for Plaintiff:

SIR:

Please Take Notice that the defendant in the above entitled cause demands within ten days from the service hereof, a Bill of Particulars of the plaintiff's claims as set forth in the Complaint, in the following respects:

1. With what metallic, mineral, gas and/or injurious substance did the plaintiff come into close contact; wherein were such substances injurious?

2. In what operations of the defendant did plaintiff necessarily come into close contact with metallic, mineral, gas and/or other substances?

3. State when and in what operations of the defendant plaintiff was exposed to and forced to inhale and breathin said metallic, mineral, gas and/or other injurious substances.

4. Name each agent and/or servant of the defendant or other person employed by defendant, and in charge of operations who had knowledge that the metallic, mineral, gas and/or other substances with which plaintiff is alleged to have come in contact or to which it is alleged the plain-

tiff was exposed and forced to inhale and breath- were injurious substances.

5. To what action of said substances alleged by the plaintiff to be injurious was plaintiff exposed which resulted in the plaintiff becoming diseased, sick, poisoned, and his internal organs, particularly his lungs, became affected and weakened.

[fol. 1333] 6. Designate specifically wherein the plaintiff alleges defendant failed to provide plaintiff with a safe place to work.

7. Designate specifically the appliances and/or safe guards which plaintiff alleged defendant should have provided plaintiff.

8. State specifically and in detail the injuries alleged by the plaintiff to have been sustained by him, external and internal, in and about his lungs, limbs and body.

9. State the exact date when plaintiff first became aware of any ill-health experienced by him and alleged by him to be due to the conditions as alleged in the complaint and charged by plaintiff to defendant.

10. Did plaintiff at any time or times inform the defendant or any of its representatives of the fact that he was suffering from ill-health experienced by him and alleged by him to be due to the conditions as alleged in the complaint and charged by plaintiff to the defendant. State exact dates and places of giving such information and the person or persons to whom such information was given.

11. State specifically and in detail the moneys alleged by plaintiff to have been expended by him in order to effect a cure of the injuries alleged to have been sustained by him and/or to minimize the suffering and arrest the progress of his condition.

12. State specifically and in detail wherein plaintiff charges defendant with negligence.

13. Date of furnishing particulars.

14. What is the age of the plaintiff?

Dated, December 24, 1935.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1334] Service of the within Demand for Bill of Particulars is hereby acknowledged this 27th day of December, 1935.

Mario Turtur, Attorney for Plaintiff.

[fol. 1335] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO DEMAND FOR BILL OF PARTICULARS

To Katzenbach, Gildea & Rudner, Esqs., Attorneys for Defendant.

SIRS:

The following are the answers to the Demand for Bill of Particulars, heretofore propounded by you, from the plaintiff, and the answers correspond numerically to the questions propounded.

1. Silicate, phosphate of soda, soda ash, sand and/or other substances, the names of which are not yet ascertained; exposure to and inhalation of said substances became injurious.

2. Furnace man, and operations in conformity to his duty, caused plaintiff to be exposed to the said substances as mentioned in number 1.

3. Plaintiff was exposed and forced to inhale and breathe the said metallic, mineral, gas and/or other injurious substances, as mentioned in number 1, during his employment while performing the operations in conformity to his duties.

4. Improper, in that it intends to pry into the case of the plaintiff and seeks names of witnesses.

5. Irritating or poisonous effect of chemicals, minerals [fol. 1336] and/or gases on skin and bronchial membranes, and lung tissues, caused his condition.

6. See Complaint.

7. Respirators, ventilation, failure of defendant to inform plaintiff of the dangerous effects of the substances used in the plant, where plaintiff was employed.

8. Severe dermatitis and furunculosis, severe bronchitis, irritating cough, general weakness, debility to such an extent that hernia, became apparent due to the strain of coughing, thereby compelling him to be operated, following which, lung broke down completely, causing formation of abscess, causing him to be totally incapacitated.

9. The plaintiff first became aware of the fact in November, 1933, when he became incapacitated, that his ill health was due to the conditions as alleged in the complaint and charged by plaintiff to the defendant.

10. Improper, in that it intends to pry into the case of the plaintiff.

11. Does not now have complete bills.

12. See Complaint.

13. January 29th, 1936.

14. 46 years of age.

Mario Turtur, Attorney for Plaintiff.

Dated January 29th, 1936.

[fol. 1337] Service of the within Answer to Bill of Particulars is hereby acknowledged this 13th day of February, 1936, as of time.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1338] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO OBTAIN PHYSICAL AND X-RAY EXAMINATION OF PLAINTIFF

To Mario Turtur, Attorney for Plaintiff.

SIR:

Please Take Notice that on Monday, the twenty-fourth day of February, 1936, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court Room, of the United States District Court for the District of New Jersey, Raymond-Commerce Building, Newark, we shall apply to such Judge as may be sitting, for an order directing an examination of the plaintiff in the above stated cause as to the injuries, if any, complained of in his complaint, by the following physicians: Dr. William H. McCallion, Elizabeth, New Jersey; Dr. S. B. English, Superintendent, New Jersey Sanitarium for Tubercular Diseases at Glen Gardner, New Jersey; and Dr. B. S. Pollack, Medical Director of the Hudson County Tubercular Hospital, Seacaucus, New Jersey; and further, for an order directing that an X-ray radiograph be taken of the plaintiff by a competent physician or rentgenologist to be selected by the defendant, said examination to be made in the presence of a representative of the parties to this action, at such time and place as the Court may direct.

The attached verified petition will be presented at the [fol. 1339] time and place herein mentioned.

Dated, February 13, 1936.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1340] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR PHYSICAL EXAMINATION OF PLAINTIFF BY PHYSICIANS, AND FOR THE TAKING OF X-RAY RADIOGRAPHS

To the Honorable Judges of the United States District Court for the District of New Jersey:

The petitioner, the Grasselli Chemical Company, respectfully shows that:

1. It is the defendant in the above entitled cause which involves a suit for personal injuries on the part of the plaintiff. In and by his complaint the said plaintiff charges that by reason of the negligence of the defendant "he became diseased, sick, poisoned, and his internal organs, particularly his lungs, were affected and weakened, so as to cause him to suffer with a disease." Plaintiff charges that such injuries were sustained while the plaintiff was engaged in working in the Silicate Department of the defendant's plant. Issue in this case has been joined and the cause noticed for trial, but said cause has not as yet been tried.

2. Petitioner says that it is necessary for the proper defense of this cause and in order to qualify its physicians and surgeons to testify in this cause as to the nature and extent and probable duration of the injuries, if any, complained of, that an examination of the plaintiff as to the injuries complained of in his complaint, be made by the following three physicians: Dr. William H. McCallion, Elizabeth, New Jersey; Dr. S. B. English, Superintendent New [fol. 1341] Jersey Sanitarium for Tubercular Diseases at Glen Gardner, New Jersey; and Dr. B. S. Pollack, Medical Director of the Hudson County Tubercular Hospital, Secaucus, New Jersey; and further, that an X-ray radiograph be taken of the plaintiff by a competent physician or rentgenologist.

Your petitioner respectfully prays, therefore, that this Court will make an order directing an examination of the plaintiff in this cause as to the injuries complained of in his complaint by the three aforementioned physicians, and also directing the taking of an X-ray radiograph of the plaintiff by a competent physician or rentgenologist.

Katzenbach, Gildea & Rudner, Attorneys for Plaintiff.

Duly sworn to by Louis Rudner. Jurat omitted in printing.

[fol. 1342] Service of the within Notice and Petition is hereby acknowledged this 18th day of February, 1936.

Mario Turtur, Attorney for Plaintiff.

[fol. 1343] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR FULLER PARTICULARS.

To Mario Turtur, Attorney for Plaintiff.

SIR:

Please Take Notice that on Monday, the twenty-fourth day of February, 1936, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court

Room, of the United States District Court for the District of New Jersey, Raymond-Commerce Building, Newark, we shall appear before such Judge of the United States District Court for the District of New Jersey as may be sitting to hear motions, and make application for an order that the plaintiff furnish to defendant the particulars required by demand Nos. 4, 10 and 11 of its demand for bill of particulars served upon the plaintiff on December 28, 1935.

Dated February 13, 1936.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1344] Service of the within Notice is hereby acknowledged this 18th day of February, 1936.

Mario Turtur, Attorney for Plaintiff.

[fol. 1345] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION

To Katzenbach, Gildea & Rudner, Attorneys for Defendant.

SIRS:

Please Take Notice that on Monday, the twenty-fourth day of February, 1936, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Court Room, of the United States District Court for the District of New Jersey, Raymond-Commerce Building, Newark, I shall appear before such Judge of the United States District Court for the District of New Jersey as may be sitting to hear motions, and make application for an order that the defendant allow the plaintiff to inspect the premises of the defendant.

Mario Turtur, Attorney for Plaintiff.

Dated February 18th, 1936.

[fol. 1346] Service of the within Notice is hereby acknowledged this — day of February, 1936.

——, Attorneys for Defendant

[fols. 1347-1348] In United States District Court

[Title omitted]

Order Allowing Inspection of Premises—Filed March 2, 1936.

This matter coming on to be heard before me in the presence of Mario Turtur, Esq., of counsel with plaintiff, and William V. Lee, Esq., of Katzenbach, Gildea & Rudner, Esqs., of counsel with defendant, on notice of motion for an inspection of the premises of the Grasselli Chemical Company, where the plaintiff worked at the time of his employment, and after having heard the argument of counsel and having considered same;

I do, hereby Order, Adjudge and Decree, on this 2nd day of March, 1936, that the plaintiff's attorney, Mario Turtur, in the presence of whatever expert or experts in his opinion may be necessary, make an inspection of the premises in whatever place or places the said plaintiff worked at the time of his employment with the defendant company, any time convenient to the respective parties, within a reasonable time before the trial of this issue.

William Clark

[File endorsement omitted.]

[fol. 1349] In Supreme Court of New Jersey, Union County

[Title omitted]

Amended Complaint

Plaintiff residing in the City of Linden, County of Union and State of New Jersey, complaining of the above named defendant, says that:

1. The Plaintiff was in the employ of the defendant in the month of November, 1933, and for some time prior thereto at defendant's plant in Grasselli, County of Union and State of New Jersey.

2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate De-

partment of defendant's plant, and was also employed in other Departments of the defendant's plant, where he performed his duties as he was directed to do during his employment in the Phosphate Department and Dorr Department.

3. It was the duty of the defendant to use reasonable diligence to protect the plaintiff from unnecessary dangers or risks, and provide plaintiff with a reasonable safe place to work.

4. During the course of his employment in and around the said department and/or departments, he necessarily came into close contact with metallic, mineral, gas and/or other injurious substances caused through the operations of the defendant, and plaintiff was exposed to and forced to [fol. 1350] inhale and breathe in the said metallic, mineral, gas and/or other injurious substances, with the result that he became diseased, sick, poisoned, and his internal organs, particularly his lungs were affected and weakened, so as to cause him to suffer with a disease; all of which was the result of the negligence of the defendant; so that in November, 1933, he became incapacitated for work.

5. The negligence of the defendant consisted in this:—(a) in failing to provide the plaintiff with a safe place to work; (b) in failing to provide the plaintiff with adequate and sufficient protection or appliances or safeguards in his said work; and (c) in failing to provide a proper ventilation system in the plant.

6. The defendant had knowledge of the dangerous effect of the inhaling and breathing in of any of the said substances aforementioned, and the plaintiff was ignorant of their danger.

7. By reason of the disease contracted through the negligence of the defendant, the plaintiff suffered and underwent, and in the future will suffer and undergo great physical pain, nervous shock and mental anguish and lost and was deprived of, and in the future will lose and be deprived of work, gains, profits and advantages which he might and otherwise would have acquired, and was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs, by him during all that time to be performed

and transacted, and was forced and obliged, and in the future will be forced and obliged to lay out and expend divers large sums of money in and about endeavoring to be cured of the disease contracted as aforesaid.

[fols. 1351-1352] Plaintiff demands as damages of the defendant, the sum of One Hundred Thousand ($100,000.) Dollars, plus costs of suit to be taxed.

Mario Turtur, Attorney for Plaintiff.

Dated June 11th, 1936.

[fol. 1353] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO COMPLAINT AS AMENDED

Defendant, The Grasselli Chemical Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having its principal office in the City of Wilmington, in said State, expressly reserving each and every objection made and exception taken by it during the course of the trial of this cause to the amending of the complaint by the plaintiff, and further reversing all other objections made and exceptions taken by it in respect of and arising out of said amendments, answering the amended complaint of the plaintiff, says that:

1. It admits that the plaintiff, known to it as George Matey, was for a time employed by it at the place mentioned in Paragraph 1 but denies that plaintiff was in its employ in the month of November 1933.

2. It admits that the plaintiff was for a time employed as a furnace worker in the silicate department of the defendant's said plant. It denies that he was employed in said department after November 1, 1932. It admits that plaintiff was employed as a laborer in the phosphate department of defendant's said plant from November 1, 1932 until October 23, 1933, when he terminated his employment with the defendant company. It denies all other matters alleged in Paragraph 2.

[fol. 1354] 3. It denies that it violated any duty which it owed to the plaintiff in any respect whatever.

4. It denies Paragraph 4.

5. It denies Paragraph 5.

6. It denies Paragraph 6 and especially denies that plaintiff was caused to breathe or inhale any of the substances mentioned in the amended complaint and denies that the plaintiff was subject to any danger.

7. It denies Paragraph 7.

Defendant denies that plaintiff is entitled to damages against it in any sum whatever.

First Separate Defense

Plaintiff's original complaint set forth a cause of action predicated upon alleged negligent acts of the defendant toward the plaintiff while he was employed in the silicate department of the defendant company's plant in Grasselli, Union County, New Jersey. Plaintiff was employed in said department as a furnace worker until November 1, 1932, and thereafter performed no work whatsoever in said department. Plaintiff's suit based upon his original complaint was filed on October 1, 1935. If, therefore, the plaintiff had a cause of action against the defendant by reason of the facts alleged in said original complaint (which is denied), said cause of action did not accrue within two years next preceding the commencement of said actions and is therefore barred by the statute in such case made and provided, and upon the expiration of said statutory period defendant acquired a vested right to be forever free from all claims or causes of action arising out of the negligent acts with which the plaintiff charges the defendant. The cause of action contained in the original complaint was barred by the statute of limitations on the date and at the time of the commencement of said suit.

[fol. 1355] The amended complaint of the plaintiff charges the defendant with negligent acts directed toward the plaintiff while he was employed in the silicate department and in the phosphate department of the defendant company's plant in Grasselli, Union County, New Jersey. Plaintiff was employed in the silicate department as a furnace worker until November 1, 1932, and was employed in the phosphate department which has as part thereof the Door plant, from November 1, 1932 until October 23, 1933, when he terminated his employment with the defendant company. Plaintiff's original suit based upon his original complaint, was filed on October 1, 1935. Plaintiff is therefor barred from amending his original complaint in the above respects in that the cause of action set forth in his original complaint was barred by the statute of limitations at the time when his original suit was instituted, and the new cause of action set forth in his amended complaint was barred by the statute of limitations at the time said amendments were offered, made and allowed. The Court is without jurisdiction to allow such amendments by reason of the defendant having acquired a vested right to be forever free from all claims or causes of action arising out of the negligent acts with which the plaintiff charged the defendant in his original complaint and in his complaint as amended.

Second Separate Defense

If the plaintiff suffered any injury while in the employ of the defendant (which is denied) the risk of such injury was assumed by the plaintiff:

Third Separate Defense

If the plaintiff ever had a cause of action against the defendant by reason of the facts alleged in the amended complaint (which is denied) said cause of action did not occur within two years next preceding the commencement of this action and is therefore barred by the statute in such case made and provided.

[fols. 1356-1357] Fourth Separate Defense

As to any breach of duty on the part of the defendant alleged by the plaintiff to have occurred more that two years prior to the commencement of this action or prior to the amendment of the complaint by the plaintiff, the defendant pleads the two year Statute of Limitations in cases of personal injury made and provided, and say that for such breach or breaches of duty plaintiff cannot recover damages from the defendant.

Fifth Separate Defense

If any of the breaches of duty alleged in the complaint as amended were committed against the plaintiff (which is denied) such breaches of duty were committed by a fellow servant or fellow servants of the plaintiff, and the defendant is not liable therefor.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1358] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY TO ANSWER TO AMENDED COMPLAINT

Plaintiff, in reply to Answer to Amended Complaint of the defendant company, says that:

Plaintiff joins issue on the Amended Answer of defendant company to those matters and things which are denied in Paragraphs 1 to 7 inclusive.

Reply to First Separate Defense

Defendant's admission in Paragraph 2 of the Amended Answer, that the plaintiff worked not only in the Silicate Department, as set out in the original complaint, but also in other departments, such as the Phosphate Department, which is set up in the Amended Complaint. This, therefore, does not bring the Amended Complaint or the action within the Statute of Limitations, nor does the said Amended Complaint set up a new cause of Action, as it was not a particular department that was the essence or gist of the cause of action, for this served only to identify the cause of action, which gave rise to it. It is the gist of the action that counts, not the place or places where plaintiff was employed, which merely are incidents of the wrong done. Plaintiff's action is based upon the continuous negligence of the defendant company in not using reasonable [fols. 1359-1360] diligence and care to protect the plaintiff from unnecessary dangers or risks and the failure of the defendant company to provide the plaintiff with a reasonably safe place to work, during the course of his employment, in any of the department or departments, he was employed in, and by reason of which he necessarily came into close contact with metallic, mineral, gas and/or other injurious substances, caused through the operations of the defendant company, and by reason of the exposure to, plaintiff was forced to inhale and breath- in the said metallic, mineral, gas and/or other injurious substances in whatever department or departments, or places, plaintiff worked in.

Reply to Second Separate Defense

Plaintiff denies the Second Separate Defense and therefore joins issue thereon.

Reply to Third Separate Defense

Plaintiff denies the Third Separate Defense and therefore joins issue thereon, and the plaintiff repeats the reply to the First Separate Defense set forth above.

Reply to Fourth Separate Defense

Plaintiff denies the Fourth Separate Defense and therefore joins issue thereon, and the plaintiff repeats the reply to the First Separate Defense set forth above.

Reply to Fifth Separate Defense

Plaintiff denies the Fifth Separate Defense and therefore joins issue thereon.

Mario Turtur, Attorney for Plaintiff.

[fols. 1361-1362] IN UNITED STATES DISTRICT COURT

[Title omitted]

REJOINDER

Defendant by way of Rejoinder to the Reply to the Answer to Amended Complaint says that:

It denies all allegations contained in the Reply to the First, Second, Third, Fourth, and Fifth Separate Defenses in defendant's Answer to Amended Complaint.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1363] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION.

To the Plaintiff, George Maty, also known as George Matey, or Mario Turtur, his attorney:

Please Take Notice that upon the trial of this cause on Tuesday, the 9th day of June next, or on such other day as this cause may be tried, we shall move that the issues of this cause be confined to the case suggested by the original pleadings herein and particularly shall be limited and confined to the Silicate Department of the defendant company as particularly referred to by the plaintiff in his complaint and that no proofs be received as to any department of the defendant company other than the Silicate Department.

In the event that it be held that the complaint of the plaintiff has already been amended to include the Silicate Department as well as the Phosphate Department of the defendant company by reason of plaintiff's motion to amend made during the course of the unconcluded trial of this cause and particularly on Wednesday, May 20, 1936, and the rulings of this Court on such motion, we shall move at the time above mentioned to strike said amendment from the record of this case and that the issue of this cause be confined to the case suggested by the original pleadings herein and particularly shall be limited and confined to the Silicate Department of the defendant company as particularly referred to by the plaintiff in his complaint and that no proofs be received as to any department of the defendant company other than the Silicate Department.

[fol. 1364] The following grounds will be urged in making the aforementioned motion:

1. A new and entirely different cause of action cannot be introduced after the statute of limitations has barred the action. In the complaint of the plaintiff it is alleged that plaintiff was employed in the Silicate Department of the defendant company until on or about November 1, 1933. The complaint in this cause is tested as of October 1, 1935.

2. Plaintiff admits that he left the Silicate Department of the defendant in the Spring of 1932 and in any event

not later than November 1, 1932, and as a consequence any action with respect to the Silicate Department is barred by the statute of limitations.

3. The amendment as suggested is in substance an attempt to create a cause of action which has already been barred by the statute of limitations.

4. Plaintiff's case is predicated upon his having sustained the injuries complained of in the Silicate Department of the defendant company, and as a consequence any and all allegations and proofs with respect to the Phosphate Department of the defendant company are irrelevant, incompetent and immaterial to the issues of this case.

Dated June 4, 1936.

Katzenbach, Gildea & Rudner, Attorneys for Defendant.

[fol. 1365] Service of the within Notice of Motion is hereby acknowledged this 4th day of June, 1936.

Mario Turtur, Attorney for Plaintiff.

[fols. 1366-1367] IN UNITED STATES DISTRICT COURT

[Title omitted]

RULE FOR JUDGMENT

This case was tried before Honorable William Clark, Judge of the United States District Court for the District of New Jersey, and a jury at the New Post Office Building, Newark, New Jersey, on the 9th day of June, 1936, and days subsequent thereto, concluding on June 19th, 1936;

The cause having been heard and submitted to the jury, they returned their verdict as follows: in favor of the plaintiff and against the defendant for Seventeen Thousand ($17,000.00) Dollars;

Whereupon it is adjudged that the plaintiff recover of the defendant, the sum of Seventeen Thousand ($17,000.00) Dollars and his costs.

William Clark.

Judgment entered this 23 day of June, 1936.

[fol. 1368] IN UNITED STATES DISTRICT COURT

[Title omitted]

RULE TO SHOW CAUSE

The defendant, The Grasselli Chemical Company, having applied within the time limited by law for a judgment in behalf of the defendant notwithstanding the verdict as rendered by the jury in behalf of the plaintiff, or in the alternative for a new trial in the above entitled action, upon the following grounds:

1. That the verdict of the jury was contrary to the weight of the evidence;

2. That the verdict of the jury was a result of passion and prejudice on the part of the jury;

3. That the verdict of the jury was contrary to law;

4. That the verdict of the jury was contrary to the charge of the Court;

5. That the verdict of the jury was excessive in amount;

It is, on this 23 day of June, 1936, on motion of Katzenbach, Gildea & Rudner, attorneys for the defendant, ordered that the plaintiff, George Matey, show cause before this Court on Monday, the 13th day of July, next, at 10:30 o'clock in the forenoon (eastern daylight saving time), at the Court Room, in the New United States Post-Office Building, in the City of Newark, New Jersey, why the verdict in favor of the plaintiff and against the defendant should not be set aside and judgment entered in behalf [fols. 1369-1370] of the defendant and against the plaintiff notwithstanding such verdict, or in the alternative that a new trial be granted, upon one or more of the grounds above set forth.

And it is further ordered that the granting of this rule to show cause shall not operate as a waiver of any of the objections or exceptions taken by or granted in this cause to said defendant, but that each of said objections and exceptions is hereby expressly reserved to said defendant, for the purpose of said defendant taking an appeal after this Court shall have filed its determination under this rule to show cause.

And it is further ordered that the granting of this rule shall not preclude the taking of an appeal by said defendant in the event that this rule is discharged.

And it is further ordered that pending the determination of this rule to show cause all further proceedings in this cause be and the same hereby are stayed, and the plaintiff is hereby restrained from taking any further proceedings or steps in this cause.

And it is further ordered that a true but uncertified copy of this rule to show cause be served upon the plaintiff or his attorney within five days from the date hereof.

William Clark, United States District Court Judge.

I hereby certify that the foregoing is a True Copy of the orginal on file in my office.

George T. Cranmer, Clerk, per L. A. McGurty, Deputy.

[fol. 1371] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER VACATING AND SETTING ASIDE VERDICT AND JUDGMENT IN BEHALF OF PLAINTIFF AND AGAINST DEFENDANT, AND ENTERING VERDICT AND JUDGMENT IN BEHALF OF DEFENDANT AND AGAINST PLAINTIFF

The Court having heretofore, to wit, on June 23, 1936, upon motion of the defendant, the Grasselli Chemical Company, allowed a rule to show cause why the verdict rendered herein on the 19th day of June, 1936 by a jury in favor of the plaintiff, George Maty, also known as George Matey, and against the defendant, in the amount of $17,000.00, should not be set aside and judgment entered in favor of the defendant and against the plaintiff notwithstanding such verdict in behalf of the plaintiff, or in the alternative that a new trial be granted, upon one or more of the several grounds set forth in said rule to show cause, and said motion having regularly come on to be heard before this Court on July 13, 1936, in the presence of Katzenbach, Gilden & Rudner, attorneys for the defendant, and Mario Turtur, attorney for the plaintiff, and said plaintiff by his said attorney having stipulated in open court that in the event this Court concluded upon the argument of said motion that the verdict as aforesaid of the jury in behalf of the plaintiff and against the defendant be set aside, that a verdict be directed and entered by the Court in behalf of the defendant and against the plaintiff, and that judgment be thereupon entered in behalf of the defendant and against the plaintiff, and the Court, after hearing the respective attorneys on said motion, having concluded that the verdict heretofore rendered in this case on June 19, 1936 by the jury in behalf of the plaintiff and against the defendant should be vacated and set aside, and the judg- [fols. 1372-1373] ment heretofore entered on June 23, 1936 on said verdict in behalf of the plaintiff and against the defendant be opened, vacated and set aside, and that a verdict of no cause for action be entered in this cause in behalf of the defendant and against the plaintiff, and that judgment be entered thereon in behalf of the defendant and against the plaintiff;

It is, therefore, on motion of Katzenbach, Gildea & Rudner, attorneys for the defendant, on this 14th day of July, 1936, ordered and adjudged that the verdict heretofore rendered by the jury on the 19th day of June, 1936 in behalf of the plaintiff and against the defendant, be and the same hereby is vacated and set aside, and the judgment heretofore entered on said verdict on June 23, 1936, in behalf of the plaintiff and against the defendant, be opened, vacated and set aside.

It is further ordered and adjudged that a verdict of no cause ~~for~~ action be entered in this cause in behalf of the defendant and against the plaintiff, and that judgment final be entered herein in behalf of the defendant and against the plaintiff, and that the defendant, George Maty, also known as George Matey, have and receive nothing by his action and that said plaintiff go hereof without day.

William Clark, United States District Court Judge.

[fols. 1374-1375] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

And now comes, George Maty, also known as George Matey, and feeling himself aggrieved by the final decree and judgment of the Court entered on the 14th day of July, A. D. 1936, hereby prays that an appeal may be allowed to him from said judgment to the United States Circuit Court of Appeals for the Third Circuit, under and according to the laws of the United States in that behalf made and provided, and that a citation issue and that a certified transcript of all records and proceedings in this cause duly authenticated, be forthwith sent to the United States Circuit Court of Appeals for the Third Circuit, and also for an Order allowing Petitioner to file the Assignments of Errors at a later date; and also for an Order fixing the amount of the Bond, which the appellant shall give and furnish upon said appeal, either by himself or his attorney.

And your Petitioner will ever pray, etc.

Mario Turtur, Attorney for Appellant.

[fols. 1376-1377] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL

It appearing that George Maty, also known as George Matey, has filed a Petition for an allowance of an appeal to the United States Circuit Court of Appeals for the Third Circuit;

It Is, on this 30th day of July, A. D., 1936, Ordered that the said Appeal to the United States Circuit Court of Appeals for the Third Circuit from the final judgment heretofore entered in the above cause, be and the same is hereby allowed; that a citation issue; and that a certified transcript of all records and proceedings in this cause duly authenticated be forthwith sent to the United States Circuit Court of Appeals for the Third Circuit.

It is further Ordered that the appellant need not at this time file the Assignments of Errors, but that the same may be filed at a later date.

It is further Ordered that the Bond of said appeal, be and the same is hereby fixed at the sum of $250.00 and that upon the giving of such security, all further proceedings in this Court, be and they hereby are stayed until the determination of the said appeal by the United States Circuit Court of Appeals for the Third Circuit.

William Clark, Judge of the United States District Court.

[fols. 1378-1380] Bond on Appeal for $250.00 omitted in printing.

[fols. 1381-1382] Citation in usual form omitted in printing.

[fol. 1383] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION

To Katzenbach, Gildea and Rudner, Attorneys for the defendant, Grasselli Chemical Co., Trenton, N. J.

GENTLEMEN:

Please Take Notice that on Monday, August 10, 1936, I will apply to the Honorable J. Warren Davis, Associate Justice of the Circuit Court of Appeals for the Third Circuit, at his chambers in the Post Office Building, Trenton, New Jersey, at 2:00 P. M. Daylight Saving Time, for an order permitting the appellant, George Matey, to proceed with his appeal in forma pauperis.

Respectfully submitted,

Mario Turtur, Attorney for Appellant.

[fol. 1384] Service acknowledged this 5th day of August, 1936.

Katzenbach, Gildea & Rudner, Attorney of Defendant.

[fol. 1385] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL TO BE TAKEN WITHOUT PRINTING RECORD

This matter being opened to me by Mario Turtur, Attorney for the appellant and also in the presence of Francis Shunk Brown, of Counsel with the appellant, and in the presence of Louis, J. Rudner, of the firm of Katzenbach, Gildea, and Rudner, Attorneys for the appellee, wherein it was represented to me by counsel for the appellant, that the said appellant, George Maty, also known as George Matey, is destitute of means and circumstances, and that he is indigent and without funds of any kind to bring on his Appeal to the Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, and having considered the application and arguments of counsel to permit this Appeal to be taken without the printing of the record:

It Is hereby Ordered, on this 11th day of August, 1936, that permission is hereby granted that the said Appeal be taken by the said Mario Turtur, Attorney for the appellant, without the necessity of printing the record thereof, but instead, that the said Mario Turtur, cause to be typewritten one original and five copies of the transcript of the testimony at the trial and the depositions taken at the bedside of the appellant, and also five copies of the pleadings and of the argument on the Rule to Show Cause, within [fols. 1386-1387] one month from the date hereof, and that upon his having completed the said typewritten record, that he furnish a copy thereof to Katzenbach, Gildea and Rudner, Attorneys for the appellant, and that the originals thereof be filed with William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania, and a copy thereof be provided for each of the appellate Judges, so that this Court may pass upon the issues involved in said Appeal.

J. Warren Davis, Judge of the C. C. of A.

[fol. 1388] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes the plaintiff, George Maty, also known as George Matey, alleging that there are manifest errors in the record and proceedings in this action, and files the following assignments of error, upon which he will rely upon the prosecution of the appeal in this action, and upon which he prays a reversal of the judgment entered herein on July 14, 1936, and that judgment be directed in favor of the plaintiff upon the verdict:

1. The United States District Court for the District of New Jersey erred in setting aside the verdict of the jury in favor of the plaintiff in the sum of Seventeen thousand dol-

lars ($17,000.00), and directing a verdict and judgment in favor of the defendant and against the plaintiff. The said action and ruling of the Court being as follows:

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Action at Law

GEORGE MATY, Also Known as GEORGE MATEY, Plaintiff,

vs.

THE GRASSELLI CHEMICAL COMPANY, a Corporation of Delaware, Duly Authorized to Transact Business in the State of New Jersey, Defendant

On Rule to Show Cause

Order Vacating and Setting Aside Verdict and Judgment in Behalf of Plaintiff and against Defendant, and Entering Verdict and Judgment in Behalf of Defendant and against Plaintiff

[fol. 1389] "The Court having heretofore, to wit, on June 23, 1936, upon motion of the defendant, the Grasselli Chemical Company, allowed a rule to show cause why the verdict rendered herein on the 19th day of June, 1936, by a jury in favor of the plaintiff, George Maty, also known as George Matey, and against the defendant, in the amount of $17,000.00, should not be set aside and judgment entered in favor of the defendant and against the plaintiff notwithstanding such verdict in behalf of the plaintiff, or in the alternative that a new trial be granted, upon one or more of the several grounds set forth in said rule to show cause, and said motion having regularly come on to be heard before this Court on July 13, 1936, in the presence of Katzenbach, Gildea & Rudner, attorneys for the defendant, and Mario Turtur, attorney for the plaintiff, and said plaintiff by his said attorney having stipulated in open court that in the event this Court concluded upon the argument of said motion that the verdict as aforesaid of the jury in behalf of the plaintiff and against the defendant be set aside, that a verdict be directed and entered by the Court in behalf of the defendant and against the plaintiff, and that judgment be thereupon entered in behalf of the defendant and against the plaintiff, and the Court, after hearing the respective attorneys on said motion, having concluded that the verdict heretofore rendered in this case on June 19, 1936 by the jury in behalf of the plaintiff and against the defendant should be vacated and set aside, and the judgment heretofore entered on June 23, 1936 on said verdict in behalf of the plaintiff and against the defendant be opened, vacated and set aside, and that a verdict of no cause for action be entered in this cause in behalf of the defendant and against the [fol. 1390] plaintiff, and that judgment be entered thereon in behalf of the defendant and against the plaintiff;

It is, therefore, on motion of Katzenbach, Gildea & Rudner, attorneys for the defendant, on this 14th day of July, 1936, Ordered and Adjudged that the verdict heretofore rendered by the jury on the 19th day of June, 1936 in behalf of the plaintiff and against the defendant, be and the same hereby is vacated and set aside, and the judgment heretofore entered on said verdict on June 23, 1936, in behalf of the plaintiff and against the defendant, be opened, vacated and set aside.

It is further Ordered and Adjudged that a verdict of no cause for action be entered in this cause in behalf of the defendant and against the plaintiff, and that judgment final be entered herein in behalf of the defendant and against the plaintiff, and that the defendant, George Maty, also known as George Matey, have and receive nothing by his action and that said plaintiff go hereof without day.

William Clark, United States District Court Judge."

(Record-Pleadings-Pages 67-68.)

to which action of the Court an exception was taken and duly allowed and sealed, as follows:

"Mr. Turtur: I take an exception to your honor's ruling.

"Plaintiff's counsel prays an exception which is allowed [fols. 1391-1392] and sealed accordingly.

William Clark. (Sealed.)

(Transcript of Record, Vol. 3, Argument on Rule, Page 62.)

2. The United States District Court for the District of New Jersey erred in setting aside the verdict of the jury in favor of the plaintiff in the sum of Seventeen thousand dollors ($17,000.00), and directing a verdict in favor of the defendant and against the plaintiff. The said action and ruling of the Court, and the exception taken and allowed thereto, being as follows:

"The Court: So that I will have to direct a verdict in favor of the defendant.

(Transcript of Record, Vol. 3, Argument on Rule, Page 59.)

"* * *

"The Court: * * * I place it on the ground that I am satisfied that there is not sufficient knowledge attributable to this company under the rule of the cases in the Third Circuit on the subject.

(Transcript of Record, Vol. 3, Argument on Rule, Page 60.)

"* * *

"Mr. Turtur: I take an exception to your Honor's ruling.

"Plaintiff's counsel prays an exception which is allowed and sealed accordingly.

William Clark. (Sealed.)

(Transcript of Record, Vol. 3, Argument on Rule, Page 62.)

Respectfully submitted, Mario Turtur, Attorney for Plaintiff

[fol. 1393] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6224

GEORGE MATY, Appellant,

vs.

GRASSELLI CHEMICAL COMPANY, Appellee

MINUTE ENTRY OF HEARING

And afterwards, to wit, the 3d day of December, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 2d day of April, 1937, come the parties aforesaid by their counsel aforesaid, and the

Court, now being fully advised in the premises, renders the following decision:

[fol.1394] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6224

GEORGE MATY, ALSO KNOWN AS GEORGE MATEY, Appellant,

v.

GRASSELLI CHEMICAL COMPANY, Appellee.

Upon Appeal from the District Court of the United States for the District of New Jersey.

Before Buffington, Davis and Thompson, Circuit Judges.

OPINION—Filed April 2, 1937.

THOMPSON, J.:

This is an appeal from a judgment of the District Court for the District of New Jersey. The plaintiff, the appellant herein, brought suit and recovered a verdict for injuries alleged to have been sustained by him while employed in the chemical factory of the defendant. Upon argument on a motion to set aside the verdict, the parties agreed, in accordance with the court's suggestion, that if the court ruled against the plaintiff, judgment should be entered for the defendant so as to avoid the necessity for a new trial. The learned trial judge thereupon reviewed the evidence, concluded that the plaintiff had failed to prove knowledge on the part of the defendant, and relying upon our ruling in Pennsylvania Pulverizing Co. v. Butler, 61 F. (2d) 311, entered judgment for the defendant.

We do not deem it necessary to review the evidence as to the knowledge of the defendant in view of our conclusion that a verdict should have been directed for the defendant because of the two year statute of limitations. The original bill of complaint was filed October 1, 1935. The plaintiff alleged therein that he was employed as a furnace man in the silicate department of the defendant's plant, that the defendant failed to provide him with a safe place to work, adequate safety standards and proper ventilation, and that as a result the plaintiff was forced to inhale certain substances which injured his lungs. It was shown by the evidence that sometime in the year 1932 the plaintiff was transferred to the phosphate department. The action based upon negligence in the silicate department was therefore outlawed by the New Jersey two year limitation period.

At the trial the plaintiff undertook to prove that his injuries were sustained through the negligence of the defendant in the conduct of its phosphate department and obtained leave of court to amend his original bill of complaint so as to conform to the evidence so produced. We think the court should have refused to allow the amendment. The cause of action set forth in the amendment was a different cause of action from that set forth in the original complaint and, therefore, could not be introduced after the statute of limitations had run. In Union Pacific Railway v. Wyler, 158 U. S. 285, 296 the Supreme Court said:

> "The general rule is, that an amendment relates back to the time of the filing of the original petition, so that the [fol. 1395] running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies."

The negligence alleged in the amendment involved a different act, different buildings, departments, conditions and dates of exposure. Whether the trial court erred in its conclusion that there was insufficient knowledge on the part of the defendant to charge it with negligence is immaterial inasmuch as the defendant was entitled to have a directed verdict in its favor upon the issue of the statute of limitations.

The judgment of the District Court is therefore affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 1396] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6224

GEORGE MATY, Appellant,

vs.

GRASSELLI CHEMICAL CO., Appellee

JUDGMENT—Filed April 2, 1937

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, April 2, 1937.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fols. 1397-1398] IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

[Title omitted]

SUGGESTION OF DEATH AND SUBSTITUTION OF ADMINISTRATRIX —Filed April 30, 1937

And now, April 29, 1937, the death of George Maty, also known as George Matey, appellant, on the 27th day of March, 1937, and the appointment of Susie Maty, his widow, as administratrix of his estate, on the 9th day of April, 1937, by the Surrogate of Union County, New Jersey, are hereby suggested of record, and the said Susie Maty, substituted as appellant, in the above case.

Mario Turtur, Francis Shunk Brown, Attorneys for Substituted Appellant.

[File endorsement omitted.]

[fols. 1399-1410] Petition for rehearing covering 12 pages, filed May 1, 1937, omitted from this print. It was denied, and nothing more by order of June 7, 1937.

[fol. 1411] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed June 7, 1937

And Now, to wit, June 7, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— —, ——.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fol. 1412] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 1413] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: Affidavit, in forma pauperis. Motion to proceed on typewritten papers. File No. 41,859. U. S. Circuit Court of Appeals, Third Circuit. Term No. 378. Susie Maty, Administratrix of the estate of George Maty, also known as George Matey, Petitioner, vs. Grasselli Chemical Company. Petition for writ of certiorari and exhibit thereto. Filed September 3, 1937. Term No. 378, O. T. 1937.

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CHARLES [illegible]

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George
MATY, Also Known as George Matey,

Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Charles L. Guerin,
Counsel for Petitioner.

Mario Turtur,
Francis Shunk Brown,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George Maty, Also Known as George Matey,
Petitioner and Appellant Below,

vs.

GRASSELLI CHEMICAL COMPANY,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

1. This action was an action at law brought by the original plaintiff, George Maty, in the Supreme Court of New Jersey to recover damages from his employer, the Grasselli Chemical Company for a lung abscess caused, as alleged, by

the irritating and corrosive action of Soda Ash Dust to which he was exposed in the course of his employment. He charged that the defendant was negligent in failing to provide him with a safe place to work; in failing to provide him with sufficient protective appliances or safeguards in his work; and in failing to provide a proper ventilation system in the plant; that the defendant had knowledge of the dangerous effects of the plaintiff's exposure to the harmful ingredients and that the plaintiff was ignorant of the danger.

2. Upon the defendant's petition, the cause was removed to the United States District Court for the District of New Jersey because of the diversity of citizenship of the parties.

3. The case was tried before Honorable William Clark, District Judge, and a jury, and resulted in a verdict in favor of the plaintiff in the sum of $17,000.00 on June 19, 1936, upon which verdict judgment was entered for the plaintiff on June 23, 1936.

4. Subsequently, to wit, on July 14, 1936, upon defendant's rule to show cause, the District Court vacated and set aside the verdict of the jury and the judgment entered thereon in favor of the plaintiff and entered final judgment in favor of the defendant and against the plaintiff (R. 813-814).

5. The sole ground upon which the action and ruling of the learned District Court was based was that there was not sufficient knowledge attributable to the defendant (R. 784).

6. An appeal from said judgment was taken by the plaintiff to the Circuit Court of Appeals for the Third Circuit. The learned Circuit Court of Appeals on April 2nd, 1937, affirmed the judgment of the District Court upon the ground that the action of the plaintiff based upon the neg-

ligence alleged on the part of the defendant was barred by the New Jersey two year Statute of Limitations, and that an amendment to plaintiff's original bill of complaint allowed by the trial judge in the course of the trial, referring specifically to plaintiff's employment in the Phosphate Department of the defendant's plant, should have been refused. (Opinion of Thompson, J., Circuit Judge, is reported in 89 F. (2d) 456—Advance Sheets for June 7, 1937.)

7. On March 27, 1937, while the appeal was still pending in the Circuit Court of Appeals for the Third Circuit, the said George Maty died, and on April 29, 1937, his death was suggested of record, and the petitioner Susie Maty, Administratrix of his estate, was duly substituted as appellant in conformity with the rules of the Circuit Court of Appeals for the Third Circuit.

8. On May 1, 1937, a petition for re-hearing was duly filed on behalf of the appellant in the United States Circuit Court of Appeals for the Third Circuit and duly entertained by that court.

9. On June 7, 1937, the said petition for re-hearing was denied by the learned United States Circuit Court of Appeals for the Third Circuit by an order entered on behalf of the court by the Honorable J. W. Thompson, Circuit Judge (R. 824).

II.

Reasons Relied on for the Allowance of Writ.

1. The decision of said Circuit Court of Appeals as to the application of the Statute of Limitations of the State of New Jersey to the present action is a decision of an important question of local law in a way in conflict with the applicable local decisions.

2. The decision of said Circuit Court of Appeals as to the application of the Statute of Limitations of the State of New Jersey to the present action by holding that said statute barred the amending of Plaintiff's complaint to refer specifically to the additional Department of the defendant's plant where plaintiff was exposed to contact with harmful substances is an erroneous decision of an important question of general law in a way in conflict with the decisions of your Honorable Court.

3. The decision of the said Circuit Court of Appeals that the defendant was entitled to have a directed verdict in its favor upon the issue of the Statute of Limitations and that therefore it is immaterial whether the trial court erred in its conclusion that there was insufficient knowledge on the part of the defendant to charge it with negligence, is an erroneous decision of an important question of general law in conflict with the weight of authority, including the decisions of this Court.

4. Instead of affirming the judgment in favor of the defendant upon the erroneous ground that the claim of the plaintiff was barred by the Statute of Limitations of the State of New Jersey, the said Circuit Court should have considered upon their merits the assignments of error filed by the plaintiff-appellant, and should have sustained the said assignments of error and reversed the judgment of the learned District Court for the District of New Jersey and should have directed judgment to be entered in favor of the plaintiff in conformity with the verdict of the jury.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case, numbered and entitled on its Docket 6224, October Term 1936, Susie Maty, Administratrix of the Estate of George Maty, also known as George Matey, substituted appellant, *vs.* Grasselli Chemical Company, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Third Circuit be reversed by the Court; and for such further relief as to this Court may seem proper; and your petitioner will ever pray.

Susie Maty, Administratrix of the
Estate of George Maty, Also
known as George Matey,
By Charles L. Guerin,
Counsel,
#1421 Chestnut Street,
Philadelphia, Pa.

Mario Turtur,
Elizabeth, N. J.
Francis Shunk Brown,
Philadelphia, Pa.,
Of Counsel.

September 3, 1937.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Sec. 240, amended (U. S. Code Annotated, Title 28, Sec. 347 (a)) which provides:

> (a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

3. The ruling of the Circuit Court of Appeals for the Third Circuit, as appears by the opinion of Judge Thompson (R. 821) was that plaintiff's action, based upon negligence, was barred by the New Jersey Statute of Limitations, and that the defendant was entitled to have had a directed verdict in its favor upon that issue. We believe that in so ruling, the Circuit Court of Appeals was clearly in error, because its decision is in conflict with the decisions of the Court of Errors and Appeals, the Court of last resort, of the State of New Jersey, in the interpretation and application of the Statute of Limitations of that State, as illustrated by the cases of:

O'Shaughnessy v. *Bayonne News Co.,* 9 Misc. (N. J.) 345, affirmed by the Court of Errors and Appeals in 109 N. J. L. 271 (1932);

Rygiel v. *Kanengieser,* 114 N. J. L. 311 (1935);

Magliaro v. *Modern Homes, Inc.,* 115 N. J. L. 151 (1935),

and the numerous other decisions of the courts of New Jersey therein cited.

We believe further that the ruling is in conflict with the great weight of authority throughout the United States, and in conflict with the decisions of your Honorable Court, as shown by the following authorities:

37 *Corpus Juris*, page 1071, paragraphs 508, 509 & 510;
Chicago City R. Co. v. *McMenn*, 102 Ill. App. 318;
American Cotton Oil Co. v. *Saluda Oil Mill Co.*, 105 S. C. 317 (1916);
Grayson v. *Lynch*, 163 U. S. 468 (1896);
Baltimore & Potomac R. R. v. *Cumberland*, 176 U. S. 232, 238 (1900);
N. Y. Central R. Co. v. *Kinney*, 260 U. S. 340, 346 (1922).

In view of what we believe to be the clear error in the decision of this case by the Circuit Court of Appeals upon its interpretation and application of the Statute of Limitations of the State of New Jersey at variance with the decisions of the Appellate Court of that State, and viewed as a question of general law, being at variance with the great weight of authority and with the rulings of your Honorable Court, it is respectfully suggested that the question involved in the ruling sought to be reviewed comes directly within the classes of cases enumerated in Supreme Court Rule No. 38, paragraph 5, sub-section (b).

It is further respectfully suggested that the correction of the error involved in the ruling of the Circuit Court of Appeals, in the instant case, is of great importance not only to petitioner, but is of general importance. Unless the said ruling is reviewed and corrected, the situation will hereafter be presented of a serious conflict between the courts of the State of New Jersey and the Federal courts situate therein, with respect to the interpretation and application of the New Jersey statute, and the substantive right of a litigant thereunder will be made to depend upon whether his case is heard in the State Court or in the Federal court.

It is therefore urged that the present case is one in which your Honorable Court should be moved to exercise the power of supervision over the judgments and decrees of the Circuit Courts of Appeals as conferred by the Judicial Code, Sec. 240, as amended. (U. S. Code Annotated, Title 28, Sec. 347 (a).)

4. The following cases, we believe, sustain the jurisdiction of your Honorable Court to grant the prayer of the present petition for the allowance of a writ of certiorari:

Forsyth v. *Hammond,* 166 U. S. 506 (1897);

Hamilton Shoe Co. v. *Wolf Brothers & Co.,* 240 U. S. 251 (1916).

III.

Statement of the Case.

The attention of the Court is respectfully directed to paragraphs 1 to 9, inclusive, of the petition, which contain a general outline of the history of the case, which, in the interest of brevity, will not be repeated under the present point. The following additional circumstances appear to be material to the consideration of the question presented:

The original complaint (R. 788, 789) averred the plaintiff's employment in the defendant's plant in the month of November, 1933, and for sometime prior thereto; that in the course of his employment, he necessarily came into contact with injurious substances through the operations of the defendant, and was forced to inhale such dangerous substances, with the result that he became poisoned and his internal organs, particularly his lungs, were affected and weakened as the result of the negligence of the defendant, so that in November, 1933, he became incapacitated for work. The complaint specifically charged negligence on the part of the defendant:

(a) In failing to provide the plaintiff with a safe place to work;

(b) In failing to provide the plaintiff with adequate and sufficient protection, or appliances or safe-guards in his said work.

(c) In failing to provide a proper ventilation system in the plant.

The complaint also charged the defendant with knowledge of the dangerous effect of the inhaling and breathing of the substances mentioned, and averred the plaintiff's ignorance of the danger.

This complaint was filed, and the summons issued, October 1, 1935 (R. 787-789), which was less than the period of two years prescribed by the New Jersey Statute of Limitations governing actions for personal injuries. (3 N. J., Comp. St. 1910, p. 3164, Sec. 3.)

At the trial, the evidence disclosed the plaintiff's employment in the Phosphate Department of the defendant's plant, as well as in the Silicate Department, and that he was exposed to the Soda Ash Dust in both Departments (R. 85-86, 691-692, 433-434) and that such exposure continued down to the date mentioned in the original complaint, November, 1933 (R. 85). The trial judge allowed an amendment of the plaintiff's complaint to include specific reference to the Phosphate Department (R. 132-134). The amended complaint appears in the Record, pp. 803-805.

As noted above, after the verdict of the jury in favor of the plaintiff in the sum of $17,000.00, and the judgment entered for the plaintiff thereon, the trial court vacated and set aside the jury's verdict and entered finally judgment in favor of the defendant (R. 813-814), upon the sole ground that there was not sufficient knowledge attributable to the defendant to charge it with negligence (R. 784).

Upon the plaintiff's appeal to the Circuit Court of Appeals for the Third Circuit, that Court affirmed the judgment of the District Court without passing upon the errors assigned by the appellant, and predicated its affirmance upon the sole ground that the action of the plaintiff was barred by the New Jersey two year Statute of Limitations, and that the amendment of the plaintiff's original bill of complaint allowed by the trial judge in the course of the trial, should have been refused (R. 821, reported in 89 F. (2d) 456).

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding as follows:

> "We do not deem it necessary to review the evidence as to the knowledge of the defendant in view of our conclusion that a verdict should have been directed for the defendant because of the two year Statute of Limitations" (R. 821).

2. The Circuit Court of Appeals erred in finding and holding as follows:

> "It was shown by the evidence that sometime in the year 1932, the plaintiff was transferred to the phosphate department. The action based upon negligence in the silicate department was therefore outlawed by the New Jersey two years limitation period" (R. 822).

3. The Circuit Court of Appeals erred in finding and holding as follows:

> "At the trial the plaintiff undertook to prove that his injuries were sustained through the negligence of the defendant in the conduct of its phosphate department and obtained leave of court to amend his original bill of complaint so as to conform to the evidence so produced. We think the court should have refused to allow the amendment. The cause of action set forth in the amendment was a different cause of action from

> that set forth in the original complaint and, therefore, could not be introduced after the statute of limitations had run" (R. 822).

4. The Circuit Court of Appeals erred in finding and holding as follows:

> "The negligence alleged in the amendment involved a different act, different buildings, departments, conditions and dates of exposure. Whether the trial court erred in its conclusion that there was insufficient knowledge on the part of the defendant to charge it with negligence is immaterial inasmuch as the defendant was entitled to have a directed verdict in its favor upon the issue of the statute of limitations" (R. 822).

5. The Circuit Court of Appeals erred in entering its order, dated April 2, 1937, affirming the judgment of the District Court of the United States for the District of New Jersey (R. 823).

V.

ARGUMENT.

Summary of the Argument.

Point A. The decision below is contrary to and in conflict with the decisions of the Court of Errors and Appeals of New Jersey respecting the application of the Statute of Limitations.

Point B. The decision below is contrary to the general weight of authority, including the decisions of this Court.

Point A.

Conflict With the State Decisions.

The New Jersey Statute of Limitations provides as follows:

> "All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any * * * corporation or corporations within this

> State, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after." (3 N. J. Comp. St. 1910, p. 3164, Section 3.)

That in a case of continuous exposure to deleterious substances injuriously affecting the plaintiff, the Statute of Limitations would not begin to run until the date of the last exposure, is accepted law, and was conceded by the defendant's counsel below.

It is to be borne in mind that in his original complaint, paragraph 1, the plaintiff pleaded the whole term of his employment down to the month of November, 1933; that the negligence charged in paragraph 5 thereof related generally to the failure to provide the plaintiff with a safe place to work, the failure to provide adequate protection, appliances or safeguards therein, and the failure to provide a proper ventilation system *in the plant* (R. 788-789); that there was testimony at the trial of plaintiff's exposure to the harmful substances down to the end of November, 1933 (R. 85, 433-434, 568), which the jury's verdict establishes in plaintiff's favor. This was clearly less than two years prior to the filing of the complaint and the issuance of the summons on October 1, 1935 (R. 787-789).

That under these circumstances, the amendment allowed had merely made specific reference to the phosphate department as one of the Departments in which the plaintiff was employed in the defendant's plant in the period originally pleaded, involving no change in the cause of action, because the "gist" of the complaint remained the same, is clearly shown by the decisions of the Court of last resort of the State of New Jersey.

In *O'Shaughnessy* v. *Bayonne News Co.,* 9 Misc. 345, 347 (affirmed by the Court of Errors and Appeals, 1932, 109 N. J. L. 271) it was held that the place where plaintiff was injured is not the gist of the cause of action. The Court there said:

> "In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured, or as to the manner of the defendants' breach of duty, without necessarily setting up a new cause of action. 49 C. J. 316, Par. 679 (See cases cited in footnotes); *Swank* v. *Pennsylvania Railroad,* 94 N. J. L. 552; *Duffy* v. *McKenna,* 82 Id. 62; *Giardini* v. *McAdoo,* 93 N. J. L. 138; *Miller* v. *West Jersey, &c. Railroad Co.,* 76 Id. 282; *Seaboard Air Line* v. *Renn,* 241 U. S. 290; *Texas and Pacific Railway Co.,* v. *Cox,* 145 Id. 593; *Missouri, Kansas and Texas Railway Co.* v. *Wulf,* 226 Id. 570; *Hermecken* v. *Seaboard,* 239 Id. 353; *Ingwerson* v. *Chicago &c. Railroad Co.,* 150 Mo. 374; 130 S. W. Rep. 411.
>
> * * * * * * *
>
> "The place where the plaintiff was injured is not the gist of the cause of action."

In *Rygiel* v. *Kanengieser,* 114 N. J. L., 311 (1935) the Court of Error and Appeals said:

> " 'Gist' is the essential ground or object of the action in point of law, without which there would be no cause of action; the cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of the suit, without which there is no cause of action." *Casavalo* v. *D'Auria,* 12 N. J. Mis. R. 81; Affirmed, 113 N. J. L. 328.
>
> "Where a plaintiff, by amendment, sets up no new matter or claim, but merely restates in a different form, more correctly and specifically, or more clearly and concisely, the same cause of action declared in the original complaint, or merely avers that, through mistake, the time is erroneously stated in the complaint, it is not the statement of a new or different cause of action, and the statute will not avail for the period between the original and amended pleadings. *Andrews* v. *Marsden,* 278 Pa.

> 56, 122 Atl. Rep. 171; 29 A. L. R. 636; *Levin* v. *Clad & Sons, Inc.,* 244 Pa., 194; 90 Atl. Rep. 570; *Columbian Three Color Co.,* v. *Ætna Life Insurance Co.,* 183 Ill. 384; 37 C. J. 1071, 49 Id. 515."

In *Magliaro* v. *Modern Homes, Inc.,* 115 N. J. L. 151 (1935) the same Court held:

> "In amendments to complaints, after the statute of limitations has run against plaintiff's cause of action, it is quite generally held that if the identity of the transaction forming the same cause of action originally declared upon is adhered to, an amendment is not ordinarily regarded as substantially changing the plaintiff's claim or stating a new or substantially different cause of action. So an amendment will not, as a rule, be held to state a new cause of action if the facts alleged show, substantially, the same wrong with respect to the same transaction, or, if it is the same matter *more fully* and *differently laid,* or, if the gist of the action, or the subject of the controversy remains the same; and this is true although the form of the liability asserted, or the alleged incidents of the transaction, may be different. Technical rules will not be applied in determining whether the cause of action stated in the original and amended pleadings are identical, since, in the strict sense, almost any amendment may be said to change the original cause of action. 49 C. J. 510, 511. *O'Shaughnessy* v. *Bayonne News,* 9 N. J. Mis. R. 345; affirmed 109 N. J. L. 271."

Under the foregoing authorities, it cannot properly be said that the amendment allowed made any change in the cause of action averred in the original complaint. While perhaps wholly unnecessary, the amendment by referring to the phosphate department merely described more specifically the parts of the defendant's plant where plaintiff was employed. There was no change whatever respecting the defendant's duty to the plaintiff, or the evidence necessary to establish the breach thereof.

POINT B.

Conflict With General Authorities and the Decisions of This Court.

In 37 *Corpus Juris* 1071, Sections 508 and 510, the principles are stated as follows:

> #508. Making Allegations More Specific. "Where plaintiff by amendment sets up no new matter or claim, but merely restates in a different form, more correctly and specifically, or more clearly and concisely, the same cause of action set out in the original declaration, or merely declares that through mistake the time is erroneously stated in the original pleading, it is not a new suit, and the statute will not avail for the period between the original and amended pleadings."
>
> #510. Merely Amplifying Original Pleading. "Within the general rule hereinbefore stated is an amendment which merely expands or amplifies what is already alleged in support of the action, or states additional facts to strengthen the right of recovery on the original cause of action, or sets out further in detail the consequences arising from the cause of action. Especially is this true where the case made upon the trial would have been provable to the same extent had the amendment not been filed. But the original pleading must disclose an intention to litigate the matters set up in the amendment, in order that the latter shall be regarded as a continuation of the original suit."

Numerous authorities are cited in support of the above texts. See

Chicago City Co. v. *McMenn,* 102 Ill. App. 318;

American Cotton Oil Co. v. *Saluda Oil Mill Co.,* 105 S. C. 317 (1916);

Grayson v. *Lynch,* 163 U. S. 468 (1896);

Baltimore & Potomac R. R. Co. v. *Cumberland,* 176 U. S. 232, 238 (1900);

N. Y. Central R. Co. v. *Kinney,* 260 U. S. 340, 346 (1922).

In the opinion filed by Judge Thompson for the Circuit Court of Appeals in the case at bar, the only authority referred to in support of the conclusion reached is the case of *Union Pacific Railway* v. *Wyler,* 158 U. S. 285, 296, from which the general rule as to amendments is quoted. Briefly summarized, that general rule amounts to a statement that if the cause of action relied upon in the amendment is different from that originally asserted, it is too late, and the run of the Statute of Limitations is not arrested by the original complaint.

But, it is respectfully submitted that the general rule does not answer the question and is not helpful in determining what sort of change in averment constitutes a change in the cause of action. Indeed, the test of the application of the rule adopted in the *Wyler* case, as pointed out by Mr. Justice Cardozo in *U. S.* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 68 (1932) "is no longer accepted as one of general validity."

In the course of his Opinion, Mr. Justice Cardozo (page 69) quoted with approval the statement of Mr. Justice Holmes in *N. Y. Central &c. R. Co.* v. *Kinney,* 260 U. S. 340, 346, of a principle more easily applied, viz:

> "Of course an argument can be made on the other side, but where a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specific conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."

In the case at bar, the defendant clearly had notice from the beginning:

(a) That plaintiff was averring and relying upon his whole term of employment down to and including the month of November, 1933.

(b) That he was exposed to contact with metallic mineral, gas and other injurious substances, through the operations of the defendant.

(c) "With the result that he became diseased, sick and poisoned, and his internal organs, particularly his lungs, were affected" etc. * * * as a result of the negligence of the defendant; so that in November, 1933, he became incapacitated for work.

(d) That the negligence of the defendant consisted in failing to provide the plaintiff with a safe place to work; in failing to provide adequate and sufficient protection, appliances or safe-guards; and in failing to provide a proper ventilation system in the plant.

All of these matters are contained in the original complaint, and plainly informed the defendant of the specific course of conduct on the part of the defendant which constituted the gravaman of the claim which plaintiff was seeking to enforce. All of these fact elements were established by the proofs.

We respectfully contend therefore, that the decision of the Circuit Court of Appeals in the instant case was clearly erroneous; and that it is in conflict not only with the applicable decisions of the Courts of New Jersey respecting the Statute of Limitations of that State, but that viewed as a question of general law, it is in conflict with the great weight of authority, and with the decisions of this Court.

The Request For Leave to Present a Typewritten Petition for Certiorari and to Have The Same Considered Upon The Typewritten Record, Is Meritorious.

Accompanying the present petition, the petitioner, by her counsel, has presented a motion to your Honorable Court for an order allowing her to present a typewritten petition for a writ of certiorari, and permitting the said petition to be considered upon a typewritten transcript of the record, duly certified, without payment of fees or costs, etc.

In support of said motion, there has been filed the affidavit of the petitioner showing her poverty and inability to procure or pay for the printing of the record.

While the petitioner has not been able to aver that she is a citizen of the United States so as to bring herself within the provisions of the Act of July 20, 1892 (27 Stat. L. 252, as amended) (U. S. Code Ann., Title 28, Sec. 832), the case is believed to be so clearly meritorious as to move your Honorable Court, in the exercise of your equitable powers, to permit the petitioner to present a typewritten petition for a writ of certiorari, and to permit such petition to be heard upon the typewritten transcript of the record, duly certified. We believe that a precedent exists for the exercise of such discretion by the action of your Honorable Court in allowing a petition for a writ of certiorari in the case of

> *Van Der Weyde* v. *Ocean Transport Co., Ltd., et al.*, November 18, 1935, 296 U. S. 567.

The decision of your Honorable Court in that case is reported in 297 U. S. 114 (1936).

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision of the Circuit Court of Appeals for the Third Circuit may be corrected, and to that end that a Writ of Certiorari be granted, and that this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Charles L. Guerin,
Counsel for Petitioner.

Mario Turtur,
Francis Shunk Brown,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George
Maty, also known as George Matey,
Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

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Francis Shunk Brown,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George Maty, Also Known as George Matey,

Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

BRIEF FOR PETITIONER.

I.

Official Report of Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit, filed April 2, 1937, is reported in 89 Federal Reporter (2d) 456. It appears also R. 821-822.

No opinion was filed by the Circuit Court of Appeals in connection with the order of June 7, 1937, denying the petition for re-hearing.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 2, 1937 (R. 823). The appellant's petition for re-hearing

filed May 1, 1937, was denied by the Circuit Court of Appeals on June 7, 1937 (R. 824).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Sec. 240, amended (U. S. Code Annotated, Title 28, Sec. 347 (a) which provides:

> (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

3. The following cases, we believe, sustain the jurisdiction of your Honorable Court:

Forsyth v. *Hammond*, 166 U. S. 506 (1897);
Hamilton Shoe Co. v. *Wolf Brothers & Co.*, 240 U. S. 251 (1916).

III.

Statement of the Case.

1. This action was an action at law brought by the original plaintiff, George Maty, in the Supreme Court of New Jersey to recover damages from his employer, the Grasselli Chemical Company, for a lung abscess caused, as alleged, by the irritating and corrosive action of Soda Ash Dust to which he was exposed in the course of his employment. He charged that the defendant was negligent in failing to provide him with a safe place to work; in failing to

provide him with sufficient protective appliances or safeguards in his work; and in failing to provide a proper ventilation system in the plant; that the defendant had knowledge of the dangerous effects of the plaintiff's exposure to the harmful ingredients and that the plaintiff was ignorant of the danger.

2. Upon the defendant's petition, the cause was removed to the United States District Court for the District of New Jersey because of the diversity of citizenship of the parties.

3. The case was tried before Honorable William Clark, District Judge, and a jury, and resulted in a verdict in favor of the plaintiff in the sum of $17,000.00 on June 19, 1936, upon which verdict judgment was entered for the plaintiff on June 23, 1936 (R. 811).

4. Subsequently, to wit, on July 14, 1936, upon defendant's Rule to show cause, the District Court vacated and set aside the verdict of the jury and the judgment entered thereon in favor of the plaintiff and entered final judgment in favor of the defendant and against the plaintiff (R. 813).

5. The sole ground upon which the action and ruling of the learned District Court was based was that there was not sufficient knowledge attributable to the defendant (R. 784).

6. An appeal from said judgment was taken by the plaintiff to the Circuit Court of Appeals for the Third Circuit. The learned Circuit Court of Appeals on April 2, 1937, affirmed the judgment of the District Court upon the ground that the action of the plaintiff was based upon an allegation of defendant's negligence in the silicate department and was barred by the New Jersey two year Statute of Limitations, and that an amendment to plain-

tiff's original complaint allowed by the trial judge in the course of the trial, referring specifically to plaintiff's employment in the Phosphate Department of the defendant's plant, should have been refused (R. 821-822). (Opinion of Thompson, J., Circuit Judge, is reported in 89 F. (2d) 456.)

7. On March 27, 1937, while the appeal was still pending in the Circuit Court of Appeals for the Third Circuit, the said George Maty died, and on April 29, 1937, his death was suggested of record, and the petitioner, Susie Maty, Administratrix of his estate, was duly substituted as appellant in conformity with the rules of the Circuit Court of Appeals for the Third Circuit.

8. On May 1, 1937, a petition for rehearing was duly filed on behalf of the appellant in the United States Circuit Court of Appeals for the Third Circuit and duly entertained by that Court.

9. On June 7, 1937, the said petition for rehearing was denied by the learned United States Circuit Court of Appeals for the Third Circuit by an order entered on behalf of the Court by the Honorable J. W. Thompson, Circuit Judge (R. 824).

10. The original complaint (R. 788) averred the plaintiff's employment in the defendant's plant in the month of November 1933, and for sometime prior thereto; that he was employed in the silicate department; that in the course of his employment, he necessarily came into contact with injurious substances through the operations of the defendant and was forced to inhale such dangerous substances, with the result that he became poisoned and his internal organs, particularly his lungs, were affected and weakened as the result of the negligence of the defendant, so that in November, 1933, he became incapacitated for work. The

complaint specifically charged negligence on the part of the defendant.

> "(a) in failing to provide the plaintiff with a safe place to work; (b) in failing to provide the plaintiff with adequate and sufficient protection or appliances or safe-guards in his said work; (c) in failing to provide a proper ventilation system in the plant."

The complaint also charged the defendant with knowledge of the dangerous effect of the inhaling and breathing of the substances mentioned and averred the plaintiff's ignorance of the danger.

11. This complaint was filed, and the summons issued October 1, 1935 (R. 787), which was within the period of two years prescribed by the New Jersey Statute of Limitations governing actions for personal injuries. (3 N. J. Comp. St. 1910, p. 3164, Sec. 3.)

12. At the trial, the evidence disclosed the plaintiff's employment in the Phosphate Department of the defendant's plant, as well as in the Silicate Department and that he was exposed to the soda ash dust in both departments (R. 8-13; 3-32; 52-55; 78-83; 86-88; 18-182; 188-190; 198-202; 220-221; 433-434), and that such exposure continued down to the date mentioned in the original complaint, November 1933 (R. 31-32; 85-87; 201-202). For convenience in reference, portions of the testimony relating to the conditions in the Phosphate Department are quoted in an Appendix. The trial judge allowed an amendment to the plaintiff's complaint to include specific reference to the Phosphate Department (R. 132-134). The amended complaint appears in the Record pp. 803-805.

13. There was a substantial conflict of testimony with respect to the quantity of soda ash dust in the places in which plaintiff was employed in both departments, the ade-

quacy of the ventilation, and the nature and cause of Maty's physical condition. It was conceded, however, that no respirators were furnished and that there were no exhaust fans of any kind (R. 192-193). All the disputed questions of fact and opinion were submitted to the jury which found a verdict in Maty's favor in the sum of $17,000., upon which verdict the court entered judgment for the plaintiff (R. 811).

14. Upon the argument of defendant's application for a new trial or in the alternative a judgment notwithstanding the jury's verdict, it was stipulated by counsel, upon the Court's suggestion, that if the trial judges should decide that the verdict should be set aside, a directed verdict could be entered instead of ordering a new trial, so that the losing side might appeal (R. 756-757). Thereafter, as noted above, the District Court vacated and set aside the jury's verdict and the judgment entered thereon in favor of the plaintiff and entered final judgment in favor of the defendant (R. 813) upon the sole ground that there was not sufficient knowledge attributable to the defendant (R. 784).

15. Upon the plaintiff's appeal to the Circuit Court of Appeals for the Third Circuit, that Court affirmed the judgment of the District Court without passing upon the errors assigned by the appellant and predicated its affirmance upon the sole ground that the action of the plaintiff was barred by the New Jersey two year statute of limitations, and that the amendment of the plaintiff's original bill of complaint allowed by the trial judge in the course of the trial, should have been refused. (Opinion of Thompson, J., Cricuit Judge, 89 F. (2d) 456.)

16. A petition for re-hearing having been denied by the Circuit Court of Appeals, a petition was presented to your Honorable Court on September 3, 1937 for a writ of certiorari. On October 11, 1937 the petition was granted.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding as follows:

> "We do not deem it necessary to review the evidence as to the knowledge of the defendant in view of our conclusion that a verdict should have been directed for the defendant because of the two year Statute of Limitations" (R. 821).

2. The Circuit Court of Appeals erred in finding and holding as follows:

> "It was shown by the evidence that sometime in the year 1932, the plaintiff was transferred to the phosphate department. The action based upon negligence in the silicate department was therefore outlawed by the New Jersey two year limitation period" (R. 822).

3. The Circuit Court of Appeals erred in finding and holding as follows:

> "At the trial the plaintiff undertook to prove that his injuries were sustained through the negligence of the defendant in the conduct of its phosphate department and obtained leave of court to amend his original bill of complaint so as to conform to the evidence so produced. We think the court should have refused to allow the amendment. The cause of action set forth in the amendment was a different cause of action from that set forth in the original complaint and, therefore could not be introduced after the statute of limitations had run" (R. 822).

4. The Circuit Court of Appeals erred in finding and holding as follows:

> "The negligence alleged in the amendment involved a different act, different buildings, departments, conditions and dates of exposure. Whether the trial court

erred in its conclusion that there was insufficient knowledge on the part of the defendant to charge it with negligence is immaterial inasmuch as the defendant was entitled to have a directed verdict in its favor upon the issue of the statute of limitations'' (R. 822).

5. The Circuit Court of Appeals erred in entering its order, dated April 2, 1937, affirming the judgment of the District Court of the United States for the District of New Jersey (R. 823).

6. The Circuit Court of Appeals erred in failing to sustain the assignment of errors in that court, and in failing to reverse the judgment of the District Court with directions to enter judgment in favor of the plaintiff in conformity with the verdict of the jury. (4th Reason relied upon in Petition for Writ of Certiorari, page 4.)

V.

ARGUMENT.

Summary of the Argument.

Point A. The decision of the Circuit Court of Appeals as to the application of the statute of limitations is in conflict with the rulings of the courts of the State of New Jersey respecting that statute, and is contrary to the general weight of authority, including the decisions of this Court.

Point B. The District Court was in error in holding that the evidence was insufficient to establish defendant's knowledge, and in setting aside the verdict and judgment in plaintiff's favor and entering final judgment for the defendant. The Circuit Court of Appeals should have sustained the assignments of error in that court and reinstated the plaintiff's judgment.

Point C. As the entire record is before the Supreme Court upon the certiorari, the judgments of the Circuit Court of Appeals and of the District Court should be reversed with a direction to reinstate the judgment for the petitioner.

POINT A.

The Decision Respecting the Statute of Limitations is in Conflict with the Rulings of the Courts of New Jersey and is Contrary to the General Weight of Authority, Including the Decisions of this Court.

The relevant portion of the New Jersey statute of limitation is as follows:

> "All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any * * * corporation or corporations within this State, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after." (Rev. 1877, p. 594 as amended P. L. 1896, p. 119; 3 Comp. St. 1910, p. 3164, 53.)

That in a case of gradual and continued exposure to deleterious substances injuriously affecting the plaintiff, the statute of limitations would not begin to run until the date of the last exposure, is accepted law, and was conceded by the respondent's counsel below in the statement in their brief in the Circuit Court of Appeals that "there can be no question but that the statute runs from the date of the last exposure."

It is to be borne in mind that in his original complaint, paragraph 1, the plaintiff pleaded the whole term of his employment down to the month of November, 1933; that the negligence charged in paragraph 5 thereof related generally to the failure to provide the plaintiff with a safe place to work, the failure to provide the plaintiff with adequate and sufficient protection, appliances or safe-guards therein, and the failure to provide a proper ventilation system in the plant (R. 788-789); that there was substantial testimony at the trial of plaintiff's exposure to the harmful substance, soda ash dust, down to the end of November, 1933 (R. 31-32; 85-87; 201-202), which the jury's verdict establishes in plaintiff's favor. This was obviously less than two years prior to the filing of the complaint and the issuance of the summons on October 1, 1935 (R. 787-789).

The only change made by the amended complaint (R. 803) was to add a specific reference to the Phosphate Department and Dorr Department in paragraph 2, and changing the description of the places of plaintiff's employment in defendant's plant from "said department" in the original complaint, to "said department and/or departments" (R. 804). There was no change in the averment as to the period of the plaintiff's employment; the negligence charged or the consequences of such negligence to the plaintiff. That under these circumstances, the amendment allowed involved no change in the cause of action, because the "gist" of the complaint remained the same, is clearly shown by the decisions of the court of last resort of the State of New Jersey.

In *O'Shaughnessy* v. *Bayonne News Co.*, 9 Misc. 345, 347 (affirmed by the Court of Errors and Appeals, 1932, 109 N. J. L. 271), it was held that the place where plaintiff was injured is not the gist of the cause of action. The court there said:

> "In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured, or as to the manner of the defendants' breach of duty, without necessarily setting up a new cause of action. 49 C. J. 316, Sec.

> 679 (see cases cited in foot notes); Swank *v.* Pennsylvania Railroad, 94 N. J. L. 552; Duffy *v.* McKenna, 82 Id. 62; Giardini *v.* McAdoo, *supra;* Miller *v.* West Jersey, &c., Railroad Co., 76 Id. 282; Seaboard Air Line *v.* Renn, 241 U. S. 290; Texas and Pacif. Railway *v.* Cox, 145 Id. 593; Missouri, Kansas and Texas Railway Co. *v.* Wulf, 226 Id. 570; Hermecken *v.* Seaboard, 239 Id. 353; Ingwerson *v.* Chicago, &c. Railroad Co., 150 Mo. 374, 130 S. W. Rep. 411.
>
> In the case *sub judice* the injury charged in the original complaint was alleged to have arisen out of the negligent operation of defendants' automobile. The place where the plaintiff was injured is not the gist of the cause of action."

In *Rygiel* v. *Kanengieser,* 114 N. J. L., 311 (1935) the Court of Errors and Appeals said:

> " 'Gist' is the essential ground or object of the action in point of law, without which there would be no cause of action; the cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of the suit, without which there is no cause of action." Casavalo *v.* D' Auria, 12 N. J. Mis. R. 81; Affirmed, 113 N. J. L. 328.
>
> Where a plaintiff, by amendment, sets up no new matter or claim, but merely restates in a different form, more correctly and specifically, or more clearly and concisely, the same cause of action declared in the original complaint, or merely avers that, through mistake, the time is erroneously stated in the complaint, it is not the statement of a new or different cause of action, and the statute will not avail for the period between the original and amended pleadings. Andrews *v.* Marsden, 278 Pa. 56; 122 Atl. Rep. 171; 29 A. L. R. 636; Levin *v.* Clad & Sons, Inc., 244 Pa., 194; 90 Atl. Rep. 570; Columbian Three Color Co. *v.* Ætna Life Insurance Co., 183 Ill. 384; 37 C. J. 1071; 49 Id. 515."

In *Magliaro* v. *Modern Homes, Inc.*, 115 N. J. L. 151 (1935) the same Court held:

> "In amendments to complaints, after the statute of limitations has run against plaintiff's cause of action, it is quite generally held that if the identity of the transaction forming the same cause of action originally declared upon is adhered to, an amendment is not ordinarily regarded as substantially changing the plaintiff's claim or stating a new or substantially different cause of action. So an amendment will not, as a rule, be held to state a new cause of action if the facts alleged show, substantially, the same wrong with respect to the same transaction, or, if it is the same matter *more fully and differently laid*, or, if the gist of the action, or the subject of the controversy remains the same; and this is true although the form of the liability asserted, or the alleged incidents of the transaction, may be different. Technical rules will not be applied in determining whether the cause of action stated in the original and amended pleadings are identical, since, in the strict sense, almost any amendment may be said to change the original cause of action. 49 *C. J.* 510, 511. O'Shaughnessy *v.* Bayonne News Co., 9 N. J. Mis. R. 345; affirmed 109 N. J. L. 271."

Under the facts in the present case, as established by the jury's verdict in favor of the plaintiff, it is clear that Maty's disability when he was compelled to cease his work at the end of November, 1933, was the gradual culmination of his continued exposure to the harmful and injurious effect of the soda ash dust which he was forced to inhale down to the end of his employment; that the defendant had or was legally chargeable with knowledge of the danger involved, and the plaintiff was ignorant of it; that his employer was negligent in failing to provide him with a safe place to work, with adequate and sufficient protection, appliances or safe-guards (respirators) and a proper ventilation system in the plant. These matters constituted the gravamen of his complaint—the gist of his cause of action. His original complaint gave the defendant notice of all of them. The particular parts or departments of the defendant's plant in which plaintiff was employed was an immaterial detail and could very properly be regarded as surplusage.

The amendment of the complaint to include specific reference to the Phosphate Department as one of the parts of the defendant's plant where plaintiff was employed in the period down to November, 1933, did not therefore state a new cause of action because it was still substantially the same wrong with respect to the same transaction more fully laid, and the subject of the controversy, namely, the defendant's negligence as originally charged, remained the same. (*Magliaro* v. *Modern Homes, Inc.*, 115 N. J. L. 151.)

Under a proper application of the decisions of the court of last resort of New Jersey, construing the statute of limitations of that State, as cited above, the amendment of the complaint should have been held not to have introduced a new cause of action. The ruling of the Circuit Court of Appeals to the contrary we respectfully contend, is in conflict with the local decisions. We respectfully contend also that the ruling is in conflict with the general weight of authority including the decisions of this Court.

In 37 *Corpus Juris* 1071, Sections 508 and 510, the principles regarding amendments made after the period fixed by the statute of limitations are stated as follows:

> #508. Making Allegations More Specific.—"Where plaintiff by amendment sets up no new matter or claim, but merely restates in a different form, more correctly and specifically, or more clearly and concisely, the same cause of action set out in the original declaration, or merely declares that through mistake the time is erroneously stated in the original pleading, it is not a new

> suit, and the statute will not avail for the period between the original and amended pleadings."
>
> #510. Merely Amplifying Original Pleading.—"Within the general rule hereinbefore stated is an amendment which merely expands or amplifies what is already alleged in support of the action, or states additional facts to strengthen the right of recovery on the original cause of action, or sets out further in detail the consequences arising from the cause of action. Especially is this true where the case made upon the trial would have been provable to the same extent had the amendment not been filed. But the original pleading must disclose an intention to litigate the matters set up in the amendment, in order that the latter shall be regarded as a continuation of the original suit."

In the opinion filed by Judge Thompson for the Circuit Court of Appeals in the case at bar, the only authority referred to in support of the conclusion reached is the case of *Union Pacific Railway* v. *Wyler,* 158 U. S. 285, 296, from which the general rule as to amendments is quoted. Briefly summarized, that general rule amounts to a statement that if the cause of action relied upon in the amendment is different from that originally asserted, it is too late, and the running of the statute of limitations is not arrested by the original complaint.

But, it is respectfully submitted that the general rule does not answer the question and is not helpful in determining what sort of change in averment constitutes a change in the cause of action. Indeed, the test of the application of the rule adopted in the *Wyler* case, namely, "a departure from law to law", as pointed out by Mr. Justice Cardozo in *U. S.* v. *Memphis Cotton Oil Co.,* 288 U. S. 68 (1932), "is no longer accepted as one of general validity." That question is not involved here.

In the course of his opinion in the *Memphis Cotton Oil Co.* case (*supra*) Mr. Justice Cardozo (p. 69) quoted with approval the statement of Mr. Justice Holmes in *N. Y. Central R. Co.* v. *Kinney,* 269 U. S. 340, 346, of a principle more easily applied, viz:

> "Of course an argument can be made on the other side, but where a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specific conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal ruling should be applied."

In the case at bar, the defendant clearly had notice from the beginning:

(a) That plaintiff was averring and relying upon his whole term of employment down to and including the *month of November,* 1933.

(b) That he was exposed to contact with metallic, mineral, gas and other injurious substances, through the operations of the defendant.

(c) "With the result that he became diseased, sick and poisoned, and his internal organs, particularly his lungs, were effected" etc. * * * as a result of the negligence of the defendant; so that *in November, 1933,* he became incapacitated for work.

(d) That the negligence of the defendant consisted in failing to provide the plaintiff with a safe place to work; in failing to provide adequate and sufficient protection, appliances or safe-guards; and in failing to provide a proper ventilation system *in the plant.*

All of these matters are contained in the original complaint (R. 788-789) and plainly informed the defendant of the specific course of conduct on the part of the defendant which constituted the *gravamen* of the claim which plaintiff was seeking to enforce. All of these fact elements were established by the proofs.

Even had there been no amendment, the proof as to plaintiff's employment in the Phosphate Department of defendant's plant after his transfer from the Silicate Department, would not have constituted a fatal variance, because under the modern authorities, such a variance must be, first, as to a material, essential matter, and second, must result in surprising or misleading the opposite party to his prejudice: 49 *Corpus Juris* 808-810.

As to the first requirement, it is almost universally held that allegations of place and time are generally immaterial. This rule has been recognized by this Court in *Grayson* v. *Lynch,* 163 U. S. 468, 478 (1896). In that case (p. 478) Mr. Justice Brown said:

> "It certainly would not be claimed that the fact that plaintiffs could not prove whether the disease was communicated to their cattle while upon their own lands or elsewhere would prevent their recovery, if the disease were communicated either in one place or the other. In such case, if the description be wholly immaterial, it may be averred to have happened either in one place or the other, and the fact that it was impossible to tell exactly where the tort took place would not constitute a variance. * * * In *United States* v. *LeBaron,* 4 Wall. 642, 648, it is said that allegations of time, quantity, value, etc., need not to be proved with precision, but that a large departure from the same is allowable. The same rule also applies to allegations of place. See also *Pope* v. *Allis,* 115 U. S. 363, where proof of the delivery of iron at a different place from that alleged in the complaint was held to have been properly admitted, defendants having failed to prove that they were misled by the variance between the averment and the proof. *Peck* v. *Waters,* 104 Mass. 345, 351."

As to the second requirement, this Court in deciding that there was no material variance in a personal injury case, between the allegation that there was no light upon the rear part of defendant's engine and proof that there was an insufficient light said, in *Baltimore & Potomac R. R. Co.* v. *Cumberland,* 176 U. S. 232, 238.

> "It is very clear that the variance between the declaration and the proof was not of a character to mislead the defendant at the trial. *Nash* v. *Towne,* 5 Wall. 689, 700; *Robbins* v. *Chicago,* 4 Wall. 657; *Grayson* v. *Lynch,* 163 U. S. 468, 476."

There is not even a pretense in the present case that defendant was surprised at the trial or mislead to its prejudice by reason of the proof that plaintiff was transferred to the Phosphate Department, sometime in 1932. Defendant was fully aware, due to its employment records, that plaintiff was not in the Silicate Department during the entire course of his employment and in paragraph 2 of the Answer specifically denied (although the contrary was not asserted in the complaint) that plaintiff was employed in the Silicate Department after November, 1932. At the trial, defendant's counsel was armed with the time sheets and employment records relating not only to plaintiff, but to all of plaintiff's fellow employees who were witnesses in his behalf. It is submitted therefore, in view of defendant's demonstrated knowledge of the facts, that no possible prejudice resulted to it from the averment in the Complaint that plaintiff was employed in the Silicate Department.

In *Chicago City R. Co.* v. *McMeen,* 102 Ill. App. Ct. 318 (1902), an amendment was made in a personal injury case after the expiration of the statute of limitations, averring a different place at which the injury occurred. The Court said:

> "The cause of action in this case is the negligence of appellant and the consequent injury to appellee; that was charged in the first declaration. A restatement or a new statement of the place at which the injury

> took place is not a statement of another cause of action. Stearns *v.* Reidy, 33 Ill. App. 246-249; Blanchard *v.* L. S. & M. S. Ry. Co., 126 Ill. 416-426; North Chicago Ry. Co. *v.* Monka, 107 Ill. 340; Mitchell *v.* Milholland, 106 Ill. 175; Dickson *v.* C. B. & Q. Ry. Co., 81 Ill. 215."

In *Seaboard Air Line* v. *Renn,* 241 U. S., 290 (1916), this Court held that an amendment during trial and after the two year limitation in the Federal Employers Liability Act, specifically averring plaintiff's employment in interstate commerce, did not set up a new cause of action. The original complaint did state that the defendant was operating a line of railroad in Virginia, North Carolina and elsewhere. In the course of the opinion (p. 293) Mr. Justice Van Devanter said:

> "If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. *Texas and Pacific Ry.* v. *Cox,* 145 U. S. 593, 603-604; *Atlantic and Pacific R. R.* v. *Laird,* 164 U. S. 393; *Hutchinson* v. *Otis,* 190 U. S. 552, 555; *Missouri, Kansas & Texas Ry.* v. *Wulf,* 226 U. S. 570, 576; *Crotty* v. *Chicago Great Western Ry.,* 95 C. C. A. 91; S. C. 169 Fed. Rep. 593."

In the case at bar, as noted above, the original complaint averred the whole period of plaintiff's employment by the defendant down to November, 1933. It charged his exposure by the defendant to injurious substances resulting in the disease and damage to his lungs, through the negligence of the defendant, "so that in November, 1933, he became incapacitated for work." The amendment "merely expanded or amplified what was alleged in support of the cause of action already asserted." It therefore "related back to the commencement of the action and was not affected by the intervening lapse of time."

We respectfully submit therefore, that the ruling of the Circuit Court of Appeals upon the question of the statute of limitations, is in conflict with the decisions of the Courts of New Jersey and is in conflict with the decisions of your Honorable Court, and should be reversed.

Point B.

The District Court was in Error in Holding that the Evidence was Insufficient to Establish Defendant's Knowledge, and in Setting Aside the Verdict and Judgment in Plaintiff's Favor and Entering Final Judgment for the Defendant. The Circuit Court of Appeals Should Have Sustained the Assignments of Error in that Court and Reinstated the Plaintiff's Judgment.

At the trial, there was a substantial conflict of testimony as to the extent of the soda ash dust present in the atmosphere, both in the silicate department and in the phosphate department of the defendant's plant where Maty worked. There was likewise a conflict of opinion among the expert witnesses regarding the chemical reactions and effect of the soda ash and other chemicals upon the persons exposed to contact with them, and much divergence of opinion between the physicians called on behalf of the plaintiff and those called on behalf of the defendant, as to the nature of Maty's physical condition and the causes which produced it. All of these questions were submitted by the Trial Judge to the jury and their verdict for the plaintiff must be taken as establishing the disputed questions in the plaintiff's favor. With respect to this situation, where the error assigned by the defendant was the refusal of the trial court to direct a verdict in its favor, this Court in an opinion by Mr. Justice Harlan in *City & Suburban Ry.* v. *Svedborg,* 194 U. S. 201, 202 (1904) said:

> "The refusal was proper; for there was evidence of a substantial character bearing upon the general issue

> as to the negligence of the defendant, and therefore the question was one peculiarly for the jury. Even if the court thought that the preponderance of evidence was for the defendant, it was not bound, simply for that reason, to have taken the case from the jury, whatever influence that fact might have in disposing of a motion for a new trial."

In setting aside the verdict for the plaintiff in the present case, and entering judgment for the defendant, the learned District Judge based his action solely on this ground:

> "I place it on the ground that I am satisfied that there is not sufficient knowledge attributable to this company under the rule of the cases in the Third Circuit on the subject" (R. 784).

On this subject, he had instructed the jury at the trial as follows:

> "Now, the question of safe place to work, of course, depends on the facts with respect to the dust, which are in dispute as I have said, and then the further fact whether the conditions of ventilation and method of removing the dust, if there was any there, were sufficient. You have the picture. You saw the plant. You heard the testimony of Dr. Smyth who said they were sufficient, as I remember it, and the testimony of the architect who said that the ventilation was in his judgment not sufficient.
>
> "Now, you will notice a further thing in that quotation that I read to you, and I am going to read it to you again: "And free from latent dangers known to the defendant company or discoverable by an ordinary prudent master under the circumstances." In other words, as you can see, it is a matter of common sense that it isn't negligence not to provide against dangers that you don't know about. So that you must consider whether the master in this case, in the exercise of ordinary prudence, could discover the dangers in this soda ash. It is the contention of the defendant company

> that the ordinarily prudent master could not discover, that there had been no recorded cases of lung abscess as a result of breathing this soda ash, and that therefore even admitting this to be a lung abscess in this case, that they had no reason to know it. Now, there is a case which was given to me by plaintiff's counsel, and I think it is illuminating on this point, with respect to manganese dust and the court, our high court, said: "'While manganese dust as a source of poisoning, presents to some extent a recent acquisition of knowledge, nevertheless there was evidence which indicated that the defendant was chargeable with notice of its dangers. Numerous cases of manganese poisoning had their origin in its plant and since 1918 it had employed consultants for its dust poisoning problems.'' Now, in this case, as I understand plaintiff's contention from the argument he made before me when you were out of the room, it is his theory that the ordinarily prudent master in this case should have known about the dangerous qualities of the soda ash, because there were cases of injury or rash on the hands and other places, I think, of the body of some of the employees that worked there. It is for you to consider whether that knowledge reasonably carried with it the knowledge that soda ash which the Master knew injured the skin also brought about lung abscess'' (R. 743-744).

We respectfully submit that the learned trial judge was correct in leaving *the question to the* jury because there was substantial and adequate evidence to require that course, and to sustain the jury's verdict, but that he was clearly in error in holding as a matter of law that the evidence was insufficient and in setting the verdict aside.

Maty began working for the defendant at its chemical manufacturing plant in 1928, at which time he was in good health (R. 3). He remained in the employment until late in November, 1933, when he became permanently incapacitated. He worked originally as a furnace helper and later as a furnace man in the silicate department where the company manufactured silicate glass, a combination of soda ash, in powder form, and sand. In the latter part of 1932, he was transferred to the phosphate department, where he worked three days of the week outside and two days inside. There was a great deal of testimony by the plaintiff and other witnesses as to the prevalence in the atmosphere in which he worked of large quantities of soda ash dust (R. 7), which at times was like smoke (R. 10-12). Portions of the testimony relating to the conditions in the phosphate department while Maty worked there are cited in the Appendix to this Brief. Witnesses for the defendant testified in contradiction of plaintiff's witnesses as to the dust conditions, or endeavored to minimize them particularly as to the phosphate department.

It was admitted by the defendant that no respirators were furnished the plaintiff and that no exhaust system had been installed (R. 192-193). The defendant depended entirely upon the windows and gravity ventilation which in the opinion of plaintiff's expert was not a proper or adequate ventilating system (R. 696-698).

In 1931, the soda ash dust gave the plaintiff the itch, developing into a skin rash and into a carbuncle. It also affected the skin under his arms. He was treated for these conditions by the plaintiff's physician (R. 25, 28) and was sent to a skin specialist. For a time Maty was given an outside job and the skin rash and itch disappeared. He was later put back in the furnace room where the same dust conditions existed and the skin condition again broke out (R. 22-23). He began to feel shortness of breath, starting of a cough, cold sweats, loss of sleep, loss of appetite and occasional fevers (R. 23-24). He consulted the plant physician and nurse (R. 24). During the winter of 1932 his condition became progressively worse and for a long time he was under treatment by the plant physician (R. 28).

Maty testified that he had to stop work in the latter part of November, 1933 because he was sick all over and getting weaker. He had lost considerable weight (R. 41). The plant physician and the superintendent sent him to Dr. Oleynick under whose care he remained until the end of January, 1934 (R. 42), when he returned to the plant for some kind of a job. At that time Mr. High, the superintendent, told him there was no job for him because around the chemicals his itch would get worse (R. 45).

In June, 1934, Maty was operated on for a hernia, being confined in the hospital for seventeen days. Before entering the hospital his condition of coughing, weakness, sleeplessness, etc. had persisted (R. 47). A few days after his return from the hospital he began emitting a foul sputum and thereafter continued expectorating approximately a pint per day (R. 48). His condition was diagnosed as a lung abscess (R. 259-260). These conditions became progressively worse so that his testimony for the trial had to be taken by deposition at his bedside where he had been confined for many months (R. 1).

Maty had no knowledge of the dangerous qualities of the soda ash dust, and was not warned or informed during his employment that this soda ash dust was harmful to his skin or dangerous to his health; but about the end of his employment the company's doctor told him that chemicals were bad for him (R. 45-55).

Joseph Laskoti who was employed for a considerable time in the same department where Maty was working (R. 188), testified that he also got a skin rash on his face, hands and leg, and was sent by his Boss to the first aid department in the plant, where he was treated for six weeks by the company's doctor (R. 193, 194). He acquired this rash in the silicate department in 1925. It continued about six months (R. 195).

Felix Smietana also testified that he got a skin rash about two years before while working in the phosphate department and that he was sent to a doctor by the company (R. 692).

Dr. Harold A. Tarrant, defendant's plant physician, testified as to observation and treatment of Maty for the skin and rash conditions "lots of times" (R. 429); that Maty had a condition which they recognized as an occupational condition due to some alkali irritations of the skin in 1932 (R. 424, 425). He further testified that in addition to Maty he treated other workmen for skin conditions due to irritations, some of which cases came from the silicate department, metasilicate, etc., including where the soda ash is, and that "that comes in with the phosphate department" (R. 433).

Dr. Gettler, a widely known toxicologist and instructor in physiological and pathological chemistry (R. 230) testified to analyses of the various samples of the dust to which Maty was exposed. His specialty deals with the effect of all kinds of chemical substances upon the human body and the organs thereof, the symptoms produced thereby, etc., and he had personally made many thousands of tests in that field (R. 238). He testified that soda ash, trisodium phosphate, and sodium silicate react qualitatively the same, and that soda ash when coming in contact with water crystallizes and produces caustic soda, a strong corrosive substance. When it comes in contact with any tissue of the body it produces three main effects: (1) that it decomposes the protein of the tissue, that is it actually decomposes the tissue. (2) it decomposes the fats and lipoids, and (3) it draws water out of the tissues, with resultant irritation, corrosion, swelling and edema (R. 241). The lung is a wet tissue, the effect of soda ash upon which is to produce corrosion, irritation and ulceration (R. 246). The breathing in of silicate, soda ash, etc., produces the conditions described (R. 246). In answer to the Court's question, the doctor further stated that if a sufficient quantity of dust particles containing caustic soda are inhaled, they produce irritation which results in an abscess (R. 239).

Dr. Pomeranz, a specialist in X-ray diagnosis and treatment (R. 257-258) examined the X-ray plates taken of Maty. He diagnosed the condition of the plaintiff as a lung abscess (R. 259) and described the symptoms produced thereby (R. 260) corroborating the testimony as to the symptoms exhibited by Maty.

Dr. Runn[illegible] testified to his examination of Maty in September, 1935, when he found him suffering from a pulmonary abscess, which diagnosis he confirmed by an examination of the X-rays. He described the symptoms which Maty exhibited (R. 267). When asked by the Court his opinion of the relation of the soda ash in the air where Maty worked, the witness replied: "If you grant that this was the condition and he did inhale the soda ash and it produced the corrosive effect that has been testified, then he would have had a long continued chronic inflammatory condition of his bronchial mucous membrane and his lungs" (R. 269).

The facts shown by the testimony for the plaintiff were summarized in a hypothetical question (R. 272-274) which the trial Judge said accurately related the testimony (R. 274). In reply to this question the doctor expressed the opinion:

> "It seemed to me that if the facts are as stated, the assumption that he was subjected to a constant chemical irritation, that so affected his skin, it would also probably produce the same effect upon his pulmonary and mucous membrane, provided it was inhaled" (R. 275).

Dr. Gluckman, a specialist in heart and lungs had examined Maty and found him suffering from an abscess of the right lung (R. 283). The witness had a large experience in dust inhalation cases—over 300. The facts shown by the testimony for the plaintiff were similarly recited to him in a hypothetical question (R. 283-285) and his opinion requested as to the cause of Maty's condition. He replied: "I believe that this condition is due to the inhalation of some irritant which caused a bronchial condition in his lung and the breaking down of this bronchial condition caused the abscess" (R. 287).

Dr. Henry F. Smyth, Jr., a witness for the defendant, testified to dust count tests made by him in May, 1936, both in the silicate and phosphate departments and found quantities of soluble alkali dust in both departments (R. 568), although the conditions prevailing at the time of his tests were not comparable with the dust conditions described in the testimony for the plaintiff (R. 569-570). Dr. H. F. Smyth, another witness for the defendant, and father of the preceding witness (R. 570) testified that anything that is irritating to the skin is also irritating to the lung (R. 581).

Dr. Chaffe (R. 307) another witness for the defendant, admitted that anything that is irritating to the skin is also irritating to the respiratory organs and lungs, if inhaled (R. 522-523).

Mr. High (R. 673), in charge of personnel at defendant's plant, had occasion at times to know about the men suffering from skin irritations (R. 679). These cases were treated at the plant hospital (R. 677) and he occasionally inquired from the doctor as to irritations (R. 679). He couldn't recall the number of such cases exactly but his "conjecture from memory" was there were probably a dozen to twenty (R. 680).

Mr. Davis, a chemical engineer at defendant's plant (R. 325) disagreed with some of the testimony for the plaintiff. He said soda ash had formerly been used to dry belts which had become wet when rained on through a leaky roof; "but not in recent years because it has a destructive effect'' (R. 407).

During the trial, with the approval of Court and counsel for the parties, the jury inspected twice the defendant's plant: on one occasion the silicate department, and on the other the phosphate department. During the testimony of defendant's witness Mr. Davis, the jurors propounded questions regarding the dust conditions which the jury experienced during their visits (R. 554). Regarding the nature of a cloud of dust that came out of the furnace while they were there and caused the jurors to cough, Mr. Davis explained: ''I would say that the cough which you had there was due to the inhalation of the soda ash dust'' (R. 598). A juror asked specifically as to white ash dust which smelled or tasted very pungent, causing a choking and coughing. Davis stated he thought: ''that was principally free soda ash, there may have been some fuel oil, combustion oil products also present'' (R. 600). There was further discussion between the jurors and the witness on the large amount of soda ash dust around at the time of their visit (R. 686), and regarding soda ash fumes (R. 688). Regarding the irritating effect upon the jurors which they experienced, Davis said that from his own experience he would say it was the soda ash dust itself. He did not think there would be any argument on it (R. 689).

Defendant's witness High, mentioned above, the man in charge of personnel at the plant, had suggested to the plant physician that Maty be sent to Dr. Oleynick after he had been treated at the plant hospital for the itch under the arms and around the groin (R. 676). Witness saw these conditions while Maty was still under treatment at the plant hospital. Maty had been given several leaves of absence ''Because Dr. Oleynick had suggested we try keeping him off the plant and see if his itch would heal up'' (R. 677).

Another of defendant's witnesses, Dr. Pollak, discussing the question of the inhalation of caustic dust, said it would manifest itself as an irritant promptly (R. 513-514) and referred to a personal experience had at the Colgate plant. When asked by a juror how the men could stand that year after year without any reaction, the witness replied: "I don't know, except that in the up-to-date American factories of the industry, the Commission of New Jersey, Labor Commission, demands and requires that these people wear these masks, which they do, and they get very little of that substance down." The Court then asked, "You mean they wear a mask at the Colgate plant?" The witness replied, "Yes, sir" (R. 514). Defendant's witness, Dr. Chaffe, the plant physician employed by the Solvay Process Company, manufacturers of soda ash, replying to questions by the Trial Judge as to precautions taken at that plant to prevent a man inhaling the soda ash, replied that in one room where there was a large amount of dust, they used respirators, but not in other parts of the plant (R. 317). He admitted that the protecting of the men's lungs from quantities of the soda ash dust was on account of the irritation to the nasal passages, but claimed that "it irritates just the same as any dust" (R. 318). He admitted he was not a chemist, and would not disagree with the testimony of plaintiff's witness, Dr. Gettler (R. 320) to the effect that the soda ash when it became wet was caustic and corrosive in character (R. 241).

As noted above, it was admitted that no respirators were furnished and, that there were no exhaust fans of any kind (R. 192-193).

The foregoing summary of evidence is merely an outline of the nature and character of the more important testimony believed to sustain the petitioner's contention on the question of the employer's knowledge. In the interest of brevity, much of the explanatory and corroborative detail of this large record has been omitted. Nor is it presented as a resume of the testimony on both sides with respect to the many issues of fact involved in the trial, since it is clear that the question of the weight of the evidence is not before this Court for consideration.

In setting aside the jury's verdict and entering final judgment for the defendant, the learned District Judge said he was satisfied there is not sufficient knowledge attributable to the company "under the rule of the cases in the Third Circuit on the subject." This reference, as interpreted by the opinion of the Circuit Court of Appeals, was to the decision in *Pennsylvania Pulverizing Co.* v. *Butler*, 61 F. (2d) 311 (1932). An examination of the opinion of Judge Woolley in that case shows that it is plainly distinguishable upon its facts, and that it announces no rule on the subject that would support the action of the learned District Court in the present case. Notwithstanding allegations of negligence in the plaintiff's complaint there with respect to the failure to provide a safe place to work, failure to install and maintain a proper ventilating system, proper masks, and failure to give plaintiff proper warning of the dangerous character of its work with the silica dust, the *plaintiff failed* to adduce substantial evidence to sustain his allegations. A proper and adequate ventilating system and proper masks were supplied and due warning to the plaintiff had been given. In the course of his opinion (p. 316) Judge Woolley said:

> "There is of course no question of a master's duty in this regard. He must instruct and warn his servant as to dangers of which he knows or ought to know, and of which he knows or ought to know the servant is, from the nature of things, ignorant. Ramsay *v.* Raritan Copper Works, 78 N. J. Law, 474, 74 A. 437; Rhobovsky *v.* N. J. Worsted Spinning Company, 76 N. J. Law, 542, 70 A. 170."

After commenting on the divergence in the expert testimony as to whether the plaintiff had silicosis and precisely what the effect of long exposure to silica dust would be, his opinion continues (p. 316):

> "Yet, unquestionably, the defendant master should have known that there is some danger from constant exposure to dust from ground quartz. Evidently it did know it, and it realized its duty to guard against that danger by providing ventilators and respirators and then by warning its servants."

We contend that that decision, properly applied, furnishes no support or justification for the action of the District Court in the present case. Here it is an *admitted* fact that no respirators were furnished and no exhaust fans or other ventilating system installed; and by the jury's verdict, an *established* fact that in both departments Maty was exposed to contact with large quantities of soda ash dust in the atmosphere which he breathed, that it was a dangerous chemical which the employer knew had caused external injuries to Maty and many other workmen, and should have known was likely to cause internal injuries of the kind which it produced in Maty; and that he was ignorant of the dangers and no warning was given him.

The legal duty of the employer to know the dangerous propensities of the materials being manufactured by him or used in his business, or to inform himself by reasonable scientific inquiry, has been declared in many cases:

In *Smith* v. *Oxford Iron Co.*, 42 N. J. L. 467-475 (1880), the Court said:

> "Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff to ascertain and make known its properties and the mode of using it either to the plaintiff himself or those under whose direction he worked * * * whether the company was aware of its dangerous qual-

> ity, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable."

In *Harvey* v. *Welch,* 86 N. H. 82; 163 Atl. 417 (1932), it was held:

> "The argument that the defendant had no actual knowledge as to the physiological effect of oxalic acid fumes, if well founded in fact, is not effective, in law to absolve him from liability. Being under a positive duty to exercise care for the safety of his servant, he was bound to make reasonable inquiry for the purpose of informing himself of the natural consequences of using the material which he furnished. A Master 'must take into account the properties of such substances as he employs for the purposes of his business and the operation of familiar physical laws upon these substances.' 3 Labatt, Master & Servant, p. 1041; 39 *C. J.,* Titl. M. & S., p. 604.
>
> "Therefore, he is chargeable with knowledge of the fact 'that the fumes given off by various substances used in industrial processes are poisonous to persons who inhale them.' 3 Labatt, M. & S., p. 1041, and cases cited; note to Pinkley *v.* Chicago, etc., R. Co. (246 Ill. 370, 92 N. E. 896), in 35 L. R. A. (N. S.) 679; note to Zajkowski *v.* American, etc., Co. (C. C. A. 258 F. 9), in 6 A. L. R. 348; 355; Gobrecht *v.* Bechwith, 82 N. J. 415, 420, 135 A. 20, 52 A. L. R. 858; Thompson *v.* United Laboratories Co., 221 Mass. 276, 280, 108 N. E. 1042; Mooney *v.* Monark, etc., Co., 317 Mo. 1255, 298 S. W. 69; Baumgartner *v.* Pennsylvania, etc., Co., 292 Pa. 106, 140 A. 622."

The specific obligation on the part of the master to keep pace with scientific development and knowledge as it may affect the character of business in which he is engaged, has been asserted in *Hysell* v. *Swift & Co.,* 78 Mo. App. 39; *Adam* v. *Refrigerator Co.,* 160 Mich. 590, 125 N. W. 724; *Thompson* v. *United Laboratories Co.,* 221 Mass. 276, 108 N. E. 1042.

The contention of the employer in the present case based upon an absence of affirmative proof of other cases of lung abscess caused by soda ash dust is without force. There was abundant proof to show the employer's knowledge of the skin irritations which resulted not only to Maty but to other employees at the plant during a period of years, and specific testimony of medical witnesses for the plaintiff as well as the admissions of defendant's doctors as summarized above, that any substances that would so irritate and affect the skin, would be found more irritating to the lungs when inhaled. The sufficiency of this testimony to warrant the jury in attributing knowledge on the part of the employer or its reason to have such knowledge is clearly shown by the decisions in: *Louisville & Nashville R. Co.* v. *Wright,* 183 Ky. 634, 210 S. W. 184; *Collins* v. *Pecos & N. T. R. Co.,* 110 Tex. 577, 212 S. W. 477; *Thompson* v. *United Laboratories Co.,* 221 Mass. 276, 108 N. E. 1042; *Fritz* v. *Elk Tanning Co.,* 258 Pa. 180, 101 Atl. 958; *Jacque* v. *Locke Insulator Co.,* 70 F. (2d) 680; (C. C. E. (2nd) 1934); *Gallagher* v. *Lehberger,* 84 N. J. L. 712 (E. & A., 1913); *Hammil* v. *Penna. R. R. Co.,* 56, N. J. L. 370; and *Newark R. R. Co.* v. *McCann,* 58 N. J. L. 642 (E. & A., 1896).

We respectfully submit that the authorities cited demonstrate the sufficiency of the evidence in the present case to require the submission to the jury of the element of the employer's knowledge, and to sustain the jury's verdict in Maty's favor. The learned District Court was therefore in error in setting aside the verdict and the judgment for the plaintiff thereon, and in entering final judgment for the defendant.

The failure of the Circuit Court of Appeals to sustain the assignments of error filed by the petitioner as appellant in that court, and its failure to direct the reinstatement of the judgment in favor of the plaintiff in conformity with the verdict, was assigned by the petitioner in the petition for the writ of certiorari as the 4th reason relied upon for the allowance of the writ (petition, p. 4).

Point C.

As the Entire Record Is Before the Supreme Court Upon the Certiorari, the Judgments of the Circuit Court of Appeals and of the District Court Should be Reversed with a Direction to Reinstate the Judgment for the Petitioner.

In *Delk* v. *St. Louis, etc., R. Company,* 220 U. S. 580 (1911), which was upon a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, this Court held that the Circuit Court of Appeals was in error in its construction of the Federal Safety Appliances Acts. The Circuit Court of Appeals had declined to express any opinion upon the question of contributory negligence which had been raised by the defendant upon its appeal to that court. In that case, Mr. Justice Harlan (p. 588) said:

> "In this state of the record what must be done with the case? As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this Court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the Circuit Court. Lutcher & Moore Lumber Co. *v.* Knight, 217 U. S. 257, 267." * * *
>
> "For the reason stated, the judgment of the Circuit Court of Appeals must be reversed; but as we do not perceive that any error of law was committed in the Circuit Court, to the prejudice of the carrier, the judgment of the latter court must be affirmed."

If the contentions made by the petitioner here are sustained, both the Circuit Court of Appeals and the District

Court should be reversed and the case remanded to the District Court with directions to reinstate the judgment originally entered for the plaintiff upon the verdict of the jury (R. 811). We believe the views of the Court expressed by Mr. Justice Brandeis, in *Camp et al.* v. *Gress*, 250 U. S. 308 (1919), justifies this procedure.

Respectfully submitted,

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APPENDIX.

Extracts from Testimony Relating to Conditions in the Phosphate Department of Defendant's Plant.

GEORGE MATY (R. 2):

* * * * * * *

(R. 30:)

Q. While you were filling the drums with silicate, was there any dust or gas there?

A. There is all over dust, dust, dust, dust.

Q. Did they tell you to be careful now?

A. No.

Q. Did they give you any respirator?

A. No.

Q. When was that?

A. 1932.

Q. You said it was in the winter of 1932, and then you laid off for eight or nine weeks?

A. Yes.

Q. Doctor Oleynick treated you then, and you went back and talked to Mr. High and Doctor Ward, and they put you (fol. 48) back to work in the silicate department filling these drums, is that right?

A. Yes, and then they changed me to another department.

Q. They changed you from the silicate department to what other department?

A. Phosphate of Soda and gave me a job two days outside. I was dumping rocks.

Q. What kind of rocks?

A. Phosphate rocks, what they make phosphate soda from that.

Q. What else?

A. Three days I was inside.

Q. Where were you when you were inside?

A. I was inside on top of the tanks all the time; I was operator.

Q. On top of what tanks?

A. Liquid.

Q. When you say that, you mean liquid like water?

A. Yes.

Q. And when you were working on top of these tanks, was there any chemical dust there?

A. There is a lot of dust and phosphate.

Q. Were you told to be careful in that operation?

(R. 31:)

A. No.

Q. Were there any exhaust fans there then?

A. There is no exhaust fans.

Q. Was the condition as to the chemical dust the same?

A. The same thing.

Q. Did they give you a respirator then?

A. No.

(fol. 49) Q. How long did you work around this department where you were working sometimes outside and three days inside, I think you said?

A. Three days outside and two days inside.

Q. What did you do when you were inside?

A. Operator.

Q. What did you have to do as such operator?

(R. 31:)

A. Watch the pumps and pump the mud out and put on the dryer and dry them so that they make blocks with it.

Q. What room was that in?

A. That was the Dorr plant; they call it the Dorr plant.

Q. That was not in the same department as the soda ash or silicate, was it?

A. There is a lot of soda ash because they take the liquid from me right at the tanks on my side and throw the soda ash in there with the liquid, and that is what they make phosphate soda.

Q. How long did you work at that operation, three days outside and two days inside?

A. From 1932, I don't remember what month they changed, to 1933, until the last of November.

Q. You worked until the last of November in 1933?

A. Yes.

Q. In what department?

A. Phosphate soda.

Q. Was that the last time that you worked, in November, 1933?

(fol. 50) A. Yes.

Q. The latter part of November, the end of November?

A. Yes.

Q. When you were working in this phosphate soda department, where there was silicate and soda ash, what was the condition when you stopped working in November, 1933, as to dust and so forth?

A. All the time when I started work.

Q. What was the condition as to dust in this department where you were working in November, 1933?

(R. 32:)

A. It is all dust all the time the same.

Q. It was the same condition as existed all the time before?

A. The same when they work.

Q. What kind of dust was that? From what departments?

A. Soda ash dust, and they got three kind of stones in there, and they grind them stones, and that smoke comes up on the tanks where we was working.

Q. What department was that?

A. Phosphate soda; we call it the Dorr plant.

Q. Phosphate of soda, which you call the Dorr plant?

A. Yes.

Q. What kind of chemicals did they have in that plant?

A. We have sulphuric acid and phosphate of soda rocks.

Q. Where this sulphuric acid and phosphate of soda rock was, was there any silicate and soda ash there?

(fol. 51) A. Soda ash was on the side about fifty feet; it was no silicate there.

Q. There was no silicate there?

A. No.

Q. Was there soda ash there?

A. Soda ash.

• • • • • • •

(R. 52:)

Q. Referring to this dust that you spoke about, which was as heavy as you explained, was that chemicals that you just spoke about now?

A. I don't understand.

Q. I want to know what this dust was, what kind of chemical this dust was.

A. No, only that dust from metasilicate and from the (fol. 84) soda ash.

Q. How about that dust when you worked in the phosphate department?

A. That is dust.

Q. What kind of dust was there?

A. That is only from the rock, phosphate rock.

Q. What kind of dust was it that you spoke about when you said something about caustics?

A. Caustic? They mix metasilicate with caustic, some powder.

Q. During all this time that you worked there and had this dust condition that you spoke about, did the company have any kind of machinery or fans that would take out this dust as soon as it came in, or would it stay there all day long?

A. There was no machine and no fans, no nothing.

Q. During the eight hours work that you worked there, was this chemical dust condition present every day, or were there some days when it was worse and some days better?

(R. 53:)

A. When it is foggy I could not see you from the other end and when it stays foggy in the winter time and rains, but when it is clear like this you can see the man a little bit closer, but it lays anywhere, and as soon as you go in there, you get it when it is running.

Q. Was it running all the time? Was the metasilicate department and the soda ash of this factory running all the (fol. 85) time?

A. Soda ash department running all the time, but metasilicate I hear now——

Q. Don't tell us what you hear. Just tell us how they ran when you were there until November, 1933.

A. They run all the time.

Q. How often would it run?

A. They make one hundred barrels or how much they need, and they stop, and they sell them, and they start again.

Q. How long a time would expire, one week or two weeks?

A. Sometimes three days, sometimes one week, sometimes two weeks.

Q. Would there be any of this chemical dust—that is what you mean, chemical dust?

A. Yes.

Q. Would there be any chemical dust coming from the conveyors when they dumped this various material into the hoppers?

A. Sure, from the glass it comes like powder and same dust.

Q. What do you mean by glass?

A. Silicate glass, when we dump it in the chute, that is what makes dust.

Q. Lots of dust?

A. Lots of dust.

Q. Did they have anything over in the silicate department to cool off that material?

A. They have what they make the silicate powder, laundry powder, they have a little fan in there to cool that stuff (fol. 86) that is thrown out.

Q. When they used that fan to cool the stuff that it throws out, did they make any chemical dust?

A. That don't make the dust, just pushed the dust more over.

(R. 54:)

Q. More?

A. More near the place, and it goes all over.

Q. From what department?

A. From the silicate department.

Q. To what department?

A. To our department.

Q. Where you were working?

A. Yes.

Q. When this was done did they tell you that this was bad for you?

A. No.

Q. When this was done, did they give you any respirator?

A. No.

Q. Did they tell you to be careful?

A. No.

Q. Were the windows open all the time or shut most of the time?

A. We only shut the windows when big rain comes.

Q. Were all the windows open or shut?

A. No, not all the way, about half.

Q. I am talking about all the windows. Were they open? Were some of them open and some closed or were they all open?

A. Some they shut.

Q. So you could not move them?

A. They was all the time open—I mean they was all the time shut so you could not touch it.

(fol. 87) Q. Where were these windows open in the factory, up above or down below?

A. Down below and up above the windows would be open.

Q. When these windows would be open, would that take out all this stuff?

A. No, it makes whirl around me, and on the floor.

Q. Did you ever complain to your foreman or superintendent or anybody in charge regarding the cause, and if you did, did they say anything?

A. I don't see no bosses.

Q. You are sure of what you stated before,, that at no time did you know that these chemicals were harmful to you? Is that so?

A. I didn't know nothing about them.

Q. When did you find out the first time?

A. 1931.

(R. 55:)

Q. No, I am talking about when you found out for the first time about these chemicals?

A. Oh, when the doctor examined me.

Q. That is the time?

A. That is the only time.

Q. That is when he mentioned the word chemical?

A. Yes, he says, "If you had those chemicals, you would die from them."

Q. If it comes in your head?

A. He say that is bad.

Q. But nobody ever told you to watch out for these chemicals nor did you ever know that these were harmful to you?

(fol. 88) A. Ugh, ugh.

Q. What did you mean when you said Ugh, ugh?

A. He say the chemicals is bad for me.

Q. That is the first time that you found out, when this doctor examined you in the latter part of October or November, 1933, is that right?

* * * * * * *

(R. 78:)

Q. What do you have to say with regard to the dust while you were working in the phosphate department?

A. There is dust there.

Q. Where?

A. Right in the Dorr plant and around from the side they mix, they take liquids from us and they take soda ash and put (R. 79:) it in that liquid and mix it, and that is right on our side, the same high like we are, and everything comes down in the chute, and it is mixed.

Q. It comes down the chute and goes into what?

(fol. 123) A. It is a little tank mixer.

Q. What is in the tank?

A. Liquid or water what we make, and they mix that soda ash in there and pump it out.

Q. There is not much dust there, is there?

A. There is enough dust.

Q. What do you mean by enough?

A. There is a lot of dust.

Q. Was there dust there like there was in the silicate department?

A. Sure.

Q. What do you mean by sure?

A. Yes.

Q. What do you mean by that?

A. There is a lot of dust in there, too.

Q. What becomes of the dust?

A. Well, it goes out the window because the Dorr plant is like this and it goes out the window and on the tanks and in the tanks.

Q. Are there windows in the room?

A. Yes.

Q. Are they open?

A. Open.

Q. All the windows open?

A. Sure.

Q. How many windows were there?

A. I don't know.

Q. Were there a lot of windows?

A. In the mill room where the mill is there is two mills, there is a lot of windows.

Q. Where you were working in any part of the phosphate department were there plenty of windows when you worked (fol. 124) inside?

A. Yes, there is enough windows.

Q. There were?

A. Yes, but in the bin——

* * * * * * *

(R. 82:)

Q. While you were doing this operation, was there any phosphate of soda dust there?

A. Sure, because there is beside us, right close beside us.

Q. Right close beside you?

A. Yes.

Q. What was close beside you?

A. Soda ash, they mix the soda.

(R. 83:)

Q. Referring to this soda ash and this phosphate work that you were doing, did that give off any dust?

A. Soda ash gives dust, and the rock give a little dust.

(fol. 129) Q. What rock?

A. Phosphate rock.

Q. Was there a lot of dust or a little dust?

A. A lot of dust. I would not say a little dust because if it was little dust, we don't have to sweep everyday three times.

Q. While you were doing this operation, did anybody tell you that this dust was dangerous or harmful to you?

A. No.

Q. Did you know that this dust was dangerous or harmful to you?

A. No.

Mr. Rudner: I object to that as not being redirect examination and entirely covered by the direct examination.

By Mr. Turtur:

Q. What did you mean when the question was asked of you about dust and windows in the phosphate department, and when you gave your answer, you were just about to say "But in the bin," and then you did not answer?

A. He asked me how many windows, and I said yes, but in the bin where the dry soda is, there is some windows you are not allowed to open because the dry soda will fly out, and the men have to work there when they take the dry soda for orders, and they have a belt in the cellar there, so that soda ash goes in the belt and that smokes.

(fol. 130) Q. What do you mean by smokes?

A. The dust, you have to break that.

Q. What did you mean when you said the dust and smoke?

A. The soda, dry soda, that dust comes up when you hit it.

Q. What did you mean when you used the word smoke? What did you mean by that?

A. That dust is like smoke.

Q. It is as heavy as smoke?

A. Yes, sure.

Q. You had to inhale that dust, is that so?

A. Sure, I have to.

Q. Was there anything to take out that dust from where you were working?

(R. 84:)

A. You ain't allowed to take that dust because——

Q. I didn't ask you that. I ask you if there was anything to take out that dust?

A. No, no.

Q. Were there any motor driven fans of any kind to take that out?

A. No.

Q. When these windows were open, did that take out all that dust?

A. From the bin, you ain't allowed to open windows in the bin.

Q. Did you work in the bin?

A. I was working four or five times in the bin.

Q. What do you mean by four or five times?

(fol. 131) A. Five days.

Q. Altogether five days?

A. In the bin, maybe more, all what I know straight five days.

Q. So that the last time that you were working for the Grasselli Chemical Company at the end of November, 1933, what was the chemical that you were working around?

A. Soda ash, and there is some caustic, too, but the caustic comes soda ash, and they mix with liquid and caustic.

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(R. 85:)

Q. What was the last chemical that you came in contact with in November, 1933, when you said you worked there?

A. On the Dorr plant for operator and dumping rocks.

Q. What were the chemicals? Is that what you explained before?

A. Rocks.

Q. What kind of rocks?

(R. 86:)

A. Phosphate rocks and sulphuric acid mixed with water, and the rocks goes in there.

Q. What about this soda ash that you spoke about before?

A. Soda ash was on the side. It makes dust all the time. That ain't my job.

Q. But there was soda ash on the side, and that gave you the dust, too?

A. Yes.

Q. And you also came in contact with this phosphate of soda?

A. When this draft came over here from where they make that, it comes on us, and if it comes from this side, then the soda ash go on there.

* * * * * * *

(R. 87:)

Q. When you were working in this phosphate department and also working with this sulphuric mixture and putting it on the belt after it dried out, did that give off any dust?

A. Do you mean that stuff from the tanks what we pump out and dry out?

Q. Yes.

A. That only gave you steam.

Q. In November, 1933, did you come in contact with any silicate dust at all while working for the Grasselli Chemical Company?

Mr. Rudner: I object to that as not redirect examination.

(fol. 136) Mr. Turtur: I press the question on the ground that it was brought out in cross-examination and quite a little made of it as to the last time of exposure as to silicate dust.

The Witness: Not the silicate dust, that is soda ash dust.

By Mr. Turtur:

Q. Soda ash dust and what else, if anything else?

A. Well, rock dust, soda ash, and rock dust.

Q. And that rock dust was what kind of rock?

A. Phosphate rock and another kind I don't know what is the name. There is two rocks there.

Q. On cross-examination you stated that there were a lot of windows in the phosphate department where you were working. Did all the dust that arose in that department and with which you (R. 88:) were in contact, go out from the window or did it remain in the factory where you were working?

Mr. Rudner: I object to that as incompetent, irrelevant and immaterial.

Mr. Turtur: I press the question on the ground that it is very material.

(fol. 137) Mr. Rudner: I also object on the ground that it is not redirect examination.

The Witness: It settled down in the factory and some goes out.

By Mr. Turtur:

Q. It settled down in the factory?

A. Yes, and some goes out.

Q. As to the dust that settled down in the factory, was that a whole lot of dust or a little dust?

A. A whole lot of dust.

Q. Is that where you were working?

A. Sure, because I was working on the soda and in the mill, and it laid around on there since they mixed the soda ash, and they mix everything, and it comes out this way.

Q. Near where you were working?

A. Yes, because we were working higher.

* * * * * * *

Tony Chuba (R. 196):

* * * * * * *

(R. 198:)

Q. And what was the condition in that phosphate department where you and Matey were working as to dust?

A. When we were cleaning it was plenty of dust.

Q. And where did this dust come from?

A. From the top.

Q. And what kind of dust was that?

Mr. Rudner: What are we talking about, from the top?

Mr. Turtur: We are talking about the phosphate department.

Mr. Rudner: I am not sure the witness has answered as to the phosphate department. Suppose you find out.

Q. Where did this dust come from in the phosphate department, what part did they call that, in the building?
A. From soda and when we were hoisting the rocks.
Q. Is that phosphate of soda you are talking about?
A. Phosphate soda and dry soda.
Q. Is that soda ash?
A. And soda ash too.
(fol. 210) Q. And where did this phosphate of soda and soda ash come from where you were working?
A. They come in through a chute and goes in the bin.
Q. Is that the bin room?
A. The bin but it spreads all over the dust.
Q. And that bin is right where the vats are where this mud-like chemical is, isn't it?

Mr. Rudner: I object, very definitely leading. Let us have this witness give his testimony.
Mr. Turtur: All right, withdrawn.

Q. Where is the bin with reference to these large tanks or vats where that mud-like chemical is?
A. It is not far away from the small tanks.

(R. 199:)

Q. And how far away is it?
A. About 40 feet.
Q. And from that 40 feet was there any dust that came from those bins?
A. There always was dust.
Q. That was dry dust, wasn't it?
A. Dry dust.
Q. And that is where that white powder was, in back of where those vats are?

Mr. Rudner: Now, if your Honor please, counsel has got to stop asking these leading questions or I am going to ask for a mistrial.
(fol. 211) Mr. Turtur: I don't mean to do it, your Honor please.

The Court: These witnesses are perfectly willing to say that the place was extremely dusty.

Mr. Rudner: 90 per cent of counsel's questions are leading.

Q. What was the color of that chemical?

A. White.

Q. Now, were there any ventilators of any sort in that bin behind these large vats?

A. No.

Q. Were you given any respirators in that department?

A. No.

Mr. Rudner: Object to it, any testimony with respect to these various matters.

The Court: We have had that conceded already.

Mr. Turtur: He only conceded as to the silicate department, not as to the phosphate.

Mr. Rudner: No respirators, but I go beyond that and say this, sir, that this witness is testifying about different shifts. We want the situation——

Mr. Turtur: Oh, no.

The Court: Well, there were no respirators anyway in (fol. 212) the plant, were there, Mr. Rudner?

Mr. Rudner: Only on very special jobs, not in the phosphate department.

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(R. 201:)

Q. Now, were you still working the phosphate department when George finished or when George didn't work there any more?

A. George Matey quit first.

Q. When did George Matey stop working, do you know?

A. In about '33, Chicken Day, Thanksgiving.

Q. 1933, Chicken Day?

A. Yes.

(fol. 216) A. Yes.

(R. 202:)

Q. And Chicken Day, is that Thanksgiving?

A. Yes.

Q. Are you sure?
A. Sure.
Q. Chicken Day.
A. One month before New Year's, see, Chicken Day.
Q. 1933.
A. Yes.
Q. Sure of that?
A. Yes.

* * * * * * *

(R. 202:)

Q. Were you working in the phosphate department in November, 1933?

A. Yes, in the phosphate department.

Q. You are sure of that?

A. Yes.

Q. And was George working also in the same department?

A. Yes, George was working there too.

Q. And what kind of chemical was that being used where you and George were working there, what kind of chemical?

A. Soda, soda ash and dry soda.

Q. And he said something about phosphate of soda.

(R. 203:)

A. Phosphate soda, dry soda and some other soda but he don't know the name of it.

Q. But you are sure about soda ash and you are sure about phosphate of soda?

A. Yes, they have three different kinds of soda.

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JOHN ANDRICIK (R. 218):

* * * * * * *

(R. 220:)

Q. All right. Now tell us about the phosphate department.

A. Phosphate department I was working like silico fluoride operator; they had their small mill; they grind barium rock on that mill. That makes too much dust and they had soda ash stock tank, couple of thousand ton maybe got in that tank, and we have to go up and down in couple of times and hit that thing.

Q. Do what to it?

A. Hit it so that the soda ash fall down, because they had suction pipe in it and we have to make—they had an open hole and sometimes stuck up, you know, that tank, and we have to hit (R. 221) it. I don't know how many times we have to go up and down the steps and that soda ash fall down, and when it fall down it came all around the plant. They had chutes, six or seven soda ash tanks, what they make soda ash liquor in them tanks. They put on a scale first from that big tank, that soda ash, and at the top they got a chute. That make dust too all over when we put them soda ash tanks.

(fol. 252) Q. Now, when George was working in the Phosphate department were you also working there?

A. I cannot tell you, I was working there long, maybe I see him two or three times.

Q. You saw him two or three times?

A. I saw him two or three time he was working there.

Q. And during that time you saw him in the phosphate department what was the condition as to atmosphere in the department where he was working in the phosphate?

A. It was dusty all the time.

Q. What kind of dust was it?

A. Soda ash and that barium from barium rock dust.

Q. Any phosphate of soda?

A. No, phosphate too because that carries all over.

Q. Where does the dust come from?

A. It comes from mill, they grind the barium rock and from these big hoppers they was all over, holes all around.

Q. Is there a bin in back of those large vats, in back of the phosphate department?

A. We call that in stern, that bin.

Q. And does that bin give off any fumes or chemicals of any kind?

A. Yes, when mens work and dig down there they put on (fol. 253) a belt, that belt carry it; they got nothing to take that dust, that dust goes all over from that bin.

Q. Where the men are working?

A. Yes.

* * * * * * *

Dr. Harold A. Tarrant, plant physician, at the Grasselli Chemical Company (R. 418):

(R. 433:)

Q. You spoke of some other irritation. What was that? (fol. 645) Did you treat him for that?

A. Yes, I did.

Q. What was that?

A. When I first came to the plant he had irritated areas, as I recall, without looking at the records, on his exposed parts, namely, on his hands and his forearms.

Q. Nothing beyond that?

A. No, sir.

Q. And how long did that last?

A. Oh, it lasted on and off, I guess, the best part of maybe a year.

Q. That was the other condition to which you refer?

A. Yes, sir.

Recross-examination.

By Mr. Turtur:

Q. Now, I ask you, Doctor——

Mr. Rudner: Just a moment—that's all.

Q. I ask you, Doctor, did you treat any other skin condition due to irritations?

Mr. Rudner: I object.

Q. In the plant you mean, sir?

A. Yes, sir.

Q. Many of them?

A. No, sir.

Mr. Rudner: I object as incompetent, irrele——(fol. 646)

The Court: You asked the same kind of questions about other plants. You may answer.

A. Many of them? No, I wouldn't say many of them, a low percentage.

Q. What department did they come from?

A. Well, some come from the silicate department, metasilicate, tri-sodium phosphate, phosphates.

Q. The silicate department, I presume, Doctor, you are also including where the soda ash is?

A. Yes, that comes in with the phosphate department.

(R. 434:)

Q. So that you have treated other cases due to skin irritations that came from that department?

A. Yes.

Q. That's all, thank you.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George Maty, Also Known as George Matey,

Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

REPLY BRIEF FOR PETITIONER.

I. Preliminary Statement.

At the oral argument on February 3, 1937, before your Honorable Court, leave was granted to the petitioner to file a reply brief.

The leave was requested to afford petitioner's counsel an opportunity to point out and to correct certain inaccurate statements concerning the facts appearing in the Respondent's Brief (received very shortly before the argument) and to answer a number of contentions therein made.

In view of the announcement at the argument that the present review of the case will be confined to the ruling of the Circuit Court of Appeals upon the question of the statute of limitations and the propriety of the allowance of the amendment to the complaint, this memorandum will be directed to matters bearing upon that question.

II. Inaccurate Statements in Respondent's Brief Respecting the Facts.

While it may not affect the question involved, it should be observed that the original action was not instituted in the United States District Court as stated in Respondent's Brief, page 1. The summons was issued (R. 787) and the complaint filed in the Supreme Court of New Jersey (R. 788). It was removed to the United States District Court on defendant's petition (R. 790-792).

At page 2 of Respondent's Brief it is said the motion for a directed verdict "was denied with reservations—the trial judge reserving the right to direct a verdict for the respondent upon further study of the record." Neither the statement of the trial judge quoted from Record 722 nor any of the other comments of the learned trial judge on the motion, support the implication that there was a formal reservation of the right to direct a verdict later. *After* the verdict and upon the argument of the rule to show cause, etc., counsel did enter into a stipulation at the Court's suggestion, that if the trial judge should decide that the verdict should be set aside, a directed verdict could be entered instead of ordering a new trial, so that the losing side might appeal (R. 756-757).

At page 3 of Respondent's Brief, it is said the ruling of the trial judge in vacating the judgment for the plaintiff, was predicated "primarily" upon the failure of the plaintiff to prove defendant's knowledge of probable injurious effects from the inhalation of soda ash dust, "and also" upon the doubtful proofs as to the proximate cause of lung condition and as to whether plaintiff was in fact exposed to soda ash dust while he worked in the Phosphate Department, citing

(R. 783 and 784). While there were many comments and expressions of views by the learned trial judge in the course of the argument regarding other factors, he stated expressly that he based his ruling upon the sole ground of the question of knowledge (R. 784).

At page 11 of Respondent's Brief, it is asserted: "Plaintiff terminated his employment in the Phosphate Department in October, 1933." At page 11, and elsewhere, the date October 23, 1933, is stated. Maty testified he worked at the Dorr plant (Phosphate Department) until the last of *November*, 1933 (R. 31, 41). Chuba said it was 1933, "Chicken Day, Thanksgiving" (R. 201-202).

At pages 97 and 98 of Respondent's Brief, as part of the argument on the question of the statute of limitations, it is asserted:

> "There is absolutely no proof in this case of any dust condition with respect to soda ash, phosphate of soda or metasilicate while the plaintiff was employed in the Phosphate Department" (Statements to same effect, page 100).

The attention of your Honorable Court is directed to the portions of the testimony of Maty and others on this point quoted in the *Appendix* to Petitioner's Brief, pages 35-52. The trial judge expressly instructed the jury that any verdict must be based upon a continuance of the defendant's negligence in the Phosphate Department (R. 743). At that portion of his charge to the jury the trial judge said:

> "In other words, the law is that you must have a continuing injury by the defendant company, and if you assume that the injury began at the silicate department, you have to find further that the injury continued at the phosphate plant" (R. 743).

The trial judge called the jury's attention to the fact that the testimony was conflicting as to the "exposure" of the plaintiff to the soda ash dust in the Phosphate Department (R: 743); and the jury by their verdict resolved that question in the plaintiff's favor.

That there was affirmative evidence of the plaintiff's exposure to the soda ash dust while he worked in the Phosphate Department, further appears from the recital of that fact in the hypothetical question framed by defendant's counsel (R. 531-532) as well as that framed by plaintiff's counsel (R. 272-274) respecting which the trial judge said "I think the testimony is accurately related" (R. 274).

The assertions, therefore, in Respondent's Brief that there was no exposure of the plaintiff to the soda ash dust in the phosphate department, are not justified. Upon the conflicting evidence, the jury found the fact the other way.

Respondent's Brief contains many other statements regarding the facts of the case, which are not supported by the record. Since, however, they have to do with the questions other than the statute of limitations and the amendment, the correction of them in the present Reply Brief, appears unnecessary.

III. Comment Upon the Contentions Made in Respondent's Brief, and Authorities Therein Cited.

At page 6 of Respondent's Brief, the contention is made that "Paragraphs 1, 2 and 4 of the complaint contain the pertinent parts thereof in so far as the present review is concerned (R. 788)." We believe that paragraph 5 of the complaint, in which the negligence of the defendant is charged, is equally pertinent; and that paragraphs 6 and 7 (R. 789) cannot be ignored.

Paragraph 1 of the complaint pleads the whole term of plaintiff's employment to November, 1933, at the defendant's *plant*. The corresponding paragraph 1 of the answer admits that averment, except as to the immaterial qualification respecting the *month of November* (R. 793). Paragraph 2 of the complaint is the only one in which the Silicate Department is mentioned by name, and respecting that department, paragraph 2 of the answer denied that plaintiff was there employed after *November 1, 1932.*

Since the plaintiff's proofs showed his continuous exposure to the deleterious substances in both departments down to about the end of November (Thanksgiving Day), 1933, it is clear that the suit brought October 1, 1935 (R. 787-788), was within two years, and if the Silicate Department had not been mentioned at all, no question of the statute of limitation could arise in the case. We contend the legal situation must be the same when the naming of the department or departments in which the plaintiff worked was an immaterial or non-essential detail. The amendment which was allowed to include specific reference to the Phosphate Department amounted merely to the addition of further detail.

Most of the cases cited in Respondent's Brief are so patently distinguishable that little comment is necessary.

In *Casavalo* v. *D'Auria,* 12 N. J. Misc. 81; affirmed 113 N. J. L. 328, cited on page 22, the amendment sought to add an entirely new charge of negligence, namely, the breach of a contractual or assumed duty to make repairs. In the present case, there was no change whatever in the legal duty originally set up or in the negligence charged.

In *N. & G. Taylor Co., Inc.,* v. *Anderson,* 275 U. S. 431, cited by respondent at page 25 of his brief, this Court ruled that a new cause of action was brought in by the amendment in question after the expiration of the statutory period, because the original declaration alleged an agreement between the respondent and the petitioner, while the amendment sought to set up a contract between the respondent and a certain partnership whose assets the petitioner claimed to have acquired. It was held that the change was not merely one of form because the fundamental substance of the claim was different and therefore constituted a new cause of action.

In *Buntin* v. *Chicago, R. I. & P. Ry. Co.,* 41 Fed. 744, cited at page 27, the amendment attempted nine years after the original complaint sought to base the claim upon an allegation of negligence in the construction of a bridge whereas the overflow of plaintiff's land was originally attributed to the construction of an embankment. This was held to be a substitution of an entirely new ground of recovery. A similar attempt to substitute an entirely new and different ground of recovery was involved in the case of *Birkes* v. *United Fruit Co.,* 48 F. (2d) 657, mentioned by respondent at pages 28-29.

In *Chennault* v. *Stovale,* 160 So. 146, which respondent mistakenly suggests as on all fours with the instant case, the original petition showed on its face an alleged cause of action barred by the statute, and hence failed to state any cause of action whatever. In *Salyers* v. *U. S.,* 257 Fed. 255, the amendment sought after the statutory period to add a new and wholly different cause of action.

Most of the other cases cited by respondent are instances of the attempt to introduce by an amendment a totally different legal theory or ground of complaint or the addition of a separate and distinct tort.

The case of *Calhoun* v. *Washington Veneer Co.,* 15 Pac. (2d) 943, which respondent describes as very similar to the instant case on its facts, is plainly distinguishable. There the *only* negligence related to the first room in which the plaintiff worked and his action was not commenced within the statutory period from the end of his employment in that room. Insofar as his claim was concerned, there being no negligence with respect to the second room in which he worked, the situation was precisely the same as if he had not then been working for his employer at all. In the present case, under the evidence and the charge, the verdict of the jury must be taken to have established Maty's continued exposure to the soda ash dust in the phosphate department and the continuance of his employer's negligence *qua* that department down to November, 1933, which culminated in Maty's disability and gave rise to his cause of action at that time.

None of the cases cited in Respondent's Brief affect the authority of the decisions relied upon in the brief for the petitioner and the principles therein announced. The amendment here made no change respecting the whole period of plaintiff's employment originally pleaded, the material statement of the conditions to which he was exposed, and the averment of defendant's negligence in respect thereto. The amendment merely expanded or amplified what was alleged in support of the cause of action already asserted.

The references in Respond[illegible]rief to comments of the learned trial judge in connection with the amendment need not be discussed in detail. Notwithstanding first impressions, the trial judge did allow the amendment. So far the views of the trial judge may be considered helpful, his final conclusion would be more important than his first impressions. At page 767 of the record, Judge Clark said:

> "The Court: I don't think there is anything to the statute of limitations, Mr. Rudner."

Respectfully submitted,

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Mario Turtur,
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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George Maty, also known as George Matey,
Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Louis Rudner,
Counsel for Respondent.

Carl E. Geuther,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George Maty, Also Known as George Matey,
Petitioner and Appellant Below.

vs.

GRASSELLI CHEMICAL COMPANY
Respondent and Appellee Below.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION.

Summary Statement of the Facts.

The plaintiff is the administratrix of the estate, and widow of George Maty, the original plaintiff, in an action instituted by him in his life time in the Supreme Court of the State of New Jersey against the respondent to recover damages for lung injuries alleged to have been caused by exposure to Soda Ash at the respondent's plant at Grasselli, New Jersey. The complaint alleges that George Maty was employed by the respondent until November, 1933, and that he had been subjected to certain conditions in the Silicate Department of the plant—causing his injuries; that his exposure in and around the Silicate Department consequentially rendered him ill, for which he sought damages, entering suit on October 1, 1935. The answer pleaded, among other things, the two year Statute of Limitations of the State of New Jersey, and specifically denied the employment of the plaintiff in the Silicate Department subsequent to November 1, 1932.

The testimony given by the plaintiff disclosed that (R. 30) he was transferred in the winter of 1932 from the Silicate Department to the Phosphate Department, which was located in a different building, at least five hundred feet away from the building in which the Silicate Department was located (R. 61). While employed in the Phosphate Department his working week consisted of three days spent outside and two days spent inside of the building (R. 72). It was also shown by his own testimony that he did not get sick in the Phosphate Department and that, in preparing his case, while he took samples of the material used in the Silicate Department for analysis, he took none from the Phosphate Department (R. 36-37), nor did his expert on ventilation, who made an inspection of the premises on May 11, 1936 (four days before the trial was actually started by the depositions of the plaintiff on May 15, 1936), examine any department other than the Silicate Department (R. 695), and accordingly testified only concerning that department.

The testimony of the plaintiff further developed that he thought he was transferred to the Phosphate Department in April or May of 1932 (R. 73) and that he worked three days outside and two days inside, comprising a five day week (R. 72), and that he did not work with Soda Ash in that department (R. 86) but rather with liquids (R. 73).

The records of the respondent, produced and testified to by the departmental head of the department in which the plaintiff worked, one Charles T. Davis, disclosed that the plaintiff had been transferred from the Silicate Department to the Phosphate Department on November 1, 1932 (R. 592) and that this was an entirely different building, in which different conditions prevailed and in which the plaintiff did work of a different character. While employed in the Silicate Department his work was that of a furnace operator, whereas while employed in the Phosphate Department, he did the work of a general worker (R. 591-597).

During the trial of the case, and on June 10, 1936, the plaintiff by his counsel moved to amend the original complaint to include allegations of employment and negligence in the Phosphate Department. After much discussion during which the Court expressed grave doubts as to the good faith of the amendment and the legal propriety thereof, it was allowed, over the objection of the respondent (R. 118-119).

The remaining facts are not pertinent to the question herein and for brevity's sake will be omitted. The trial proceedings were concluded by a jury verdict in favor of the plaintiff in the amount of seventeen thousand dollars ($17,000) which, upon motion for a directed verdict, submission to which both counsel agreed by stipulation (R. 757) was set aside by the trial court and judgment was entered on behalf of the defendant (R. 784-785). Upon appeal, the Circuit Court of Appeals for the Third Circuit affirmed the judgment of the trial court, holding that the case was barred by the Statute of Limitations; that the amendment to the complaint should not have been allowed, and that the defendant was entitled to have had a directed verdict in its favor (the opinion is reported in 89 F. (2d) 456).

Circuit Judge Thompson, in speaking for the Court, said on page 457:

> "The negligence alleged in the amendment involved different acts, different buildings, departments, conditions and dates of exposure."

A petition for rehearing filed on May 1, 1937, was denied by the same Court on June 7, 1937, following which this petition for certiorari was filed.

ARGUMENT.

Summary of the Argument.

A. The decision below is not contrary to and in conflict with the decisions of the Court of Errors and Appeals of New Jersey with respect to the application of the Statute of Limitations.

B. The decision below is not contrary to the general weight of authority as well as the decisions of this Court.

C. The reasons advanced by the petition for the issuance of a writ of certiorari are insufficient.

Point A.

The decision is in accord with the decisions of the State of New Jersey.

Since the New Jersey Statute of Limitations becomes the fulcrum around which the case here turns, it is quoted again for the convenience of the Court as follows:

> "All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any * * * corporation or corporations within this State, shall be commenced and instituted within two

> years next after the cause of such action shall have accrued and not after." (3 N. J. Comp. St. 1910, p. 3164, Section 3.)

Perhaps the most excellent decision on the applicability of this statute locally is found in *La Porte* v. *U. S. Radium Corp.*, 13 Fed. Supp. p. 263, decided in December, 1935, where Judge Forman, after first setting out the above statute, continues by saying:

> "This is the genuine and orthodox statute which was taken from 21 James I, c. 16. In an action at law, the plea of the statute, regardless of fraud on the part of the tort-feasor, is always a bar to recovery. The New Jersey courts have held that the Legislature did not intend that there should be any exceptions to the statute other than those expressly enacted in other sections. Moreover, it appears that in the later English statute of 3 and 4 Wm. IV, c. 27, a clause in section 26 expressly saves the remedy under that statute from the bar of concealed fraud.
>
> "In Thorpe *v.* Corwin, 20 N. J. Law, 311, 317, the Court said: 'The Statute of Limitations makes the lapse of time a positive and legal bar. When once it has begun to run against a person under no legal disability, it pursues its course uninterrupted by any subsequent events; and when the period prescribed by the statute has elapsed, the bar is complete, and its force can neither be strengthened nor impaired by anything that has happened in the meantime. * * * The statute leaves nothing for presumption. Time alone settles the rights of the parties, by the giant force of the statute.'
>
> "That is law today in New Jersey. Freeman *v.* Conover, 95 N. J. Law, 112 A. 324."

In *Gogolin* v. *Williams*, 91 N. J. L. 266, 102 Atl. 667 (E. & A.), where the plaintiffs employed the defendant, a surveyor, to make a survey and map in 1907, the following situation and language are found. In 1915 the plaintiffs discovered that the surveyor had made a mistake. In disposing of the subsequent litigation favorably to the defendant, the Court said, on page 267:

> "It is to be observed that the gravamen of the action is the hiring of a professional man to perform a service, within the line of his profession, which he negligently performed to the damage of the person employing him. In such a situation, quite uniformly, the rule has been declared to be that the Statute of Limitations begins to run from the time of the occurrence of the breach of duty, and not from the time of the discovery of actual damage, as a result of such breach.
>
> "The cases upon the subject are collected in the various digests, and a reference to some of them is all the determination of this case would seem to require. Wilcox *v.* Plummer, 4 Pet. (U. S.) 172; Troup *v.* Smith, 20 Johns. (N. Y.) 33; Freeholders *v.* Veghte, 44 N. J. L. 509; 13 Am. & Eng. Ann. Cas. 696; 25 Cyc. 1083-1116. Perhaps the most succinct statement of the rule is that contained in 17 R. C. L. 76, viz.: 'As a general rule where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another, and the law affords a remedy therefor, the Statute of Limitations attaches at once. It is not material that all the damages resulting from the act should have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. The act itself is regarded as the ground of the action, and is not legally severable from its consequences.'"

See also ***Murray*** v. ***Allen***, 103 Vt. 373, 154 Atl. 678; ***Conklin*** v. ***Draper***, 229 App. Div. 227, 241 N. Y. S. 529, affd. 254 N. Y. 620, 173 N. E. 892; ***Michalek*** v. ***United States Gypsum Co.***, 76 F. (2d) 115 (Second Circuit—1935); ***Scott*** v. ***Rhinehart & Dennis Co.***, 180 S. E. 276 (W. Va., 1935); ***Wiersycki*** v. ***Pratt & Letchworth Co.***, 271 N. Y. S. 36 (1934); ***Brown*** v. ***Tennessee Consol. Coal Co.***, 83 S. W. (2d) 568 (Tennessee, 1935).

In the instant case, taking the last date of exposure in the Silicate Department as testified to by either of the parties or their witnesses, it is established that November 1, 1932, was the date of last exposure in the Silicate Department. This is uncontradicted; in fact the plaintiff testified that he was transferred some six months earlier (R. 61).

Suit was filed on October 1, 1935, and the case proceeded to trial on June 10, 1936, at which time an amendment was offered, and allowed by the court, over objection, to include employment in the Phosphate Department and allegations of negligence therein. The employment there covered the period from November 1, 1932, to October 23, 1933. Recapitulating, the pertinent dates are:

November 1, 1932—last date of exposure in Silicate Department.

October 23, 1933—last date of employment in Phosphate Department.

October 1, 1935—date of filing suit.

June 10, 1936—date of the amendment to include the Phosphate Department.

The case of *Calhoun* v. *Washington Veneer Company*, 15 Pac. (2d) 943 (Wash. 1932), is very similar on the facts. In this case, suit was started in September, 1931. The plaintiff worked in the glue room of the defendant company from April 20, 1926, until on or about the middle of May, 1928. This room was not ventilated in accordance with the statutes of the State. He worked from the middle of May, 1928, until November 17, 1928, in another room which was properly ventilated. On p. 946 the Court said:

> "* * * Under the allegations * * * that Claude Calhoun worked for respondent in and about the glue room from on or about April 20, 1926, until on or about the middle of May, 1928, and from the middle of May, 1928, worked in another room, not

> alleged to have been improperly ventilated in violation of the Factory Act, until November 17, 1928, it is manifest that any injuries received from violation of the Factory Act by respondent, culminated and accrued about the middle of May, 1928. His action was not commenced until September, 1931, which was more than three years after the injuries had accrued under the Factory Act and would have been barred. * * *"

It is respectfully urged that the fact that the statute had run on the exposure in the Silicate Department must be taken to be established, both as a matter of local law and general authority. It is therefore deemed necessary to turn to a consideration of the plaintiff's complaint, which is set forth, so far as pertinent, below:

> "2. The plaintiff was employed by the defendant as *furnace man, operator and general worker in the Silicate Department* of defendant's plant. (Italics ours.)
>
> "3. It was the duty of the defendant to use reasonable diligence to protect the plaintiff from unnecessary dangers or risks, and provide plaintiff with a reasonable safe place to work.
>
> "4. During the course of his employment *in and around the said department*, he necessarily came into close contact with metallic, mineral, gas and/or other injurious substances caused through the operations of the defendant, and plaintiff was exposed to and forced to inhale and breathe in the said metallic, mineral, gas and/or other injurious substances, with the result that he became diseased, sick, poisoned, and his internal organs, particularly his lungs, were affected and weakened, so as to cause him to suffer with a disease; all of which was the result of the negligence of the defendant; so that in November, 1933, he became incapacitated for work." (Italics ours.)

An answer was filed, setting up among other things, the statute of limitations as a defense. At the trial of the cause, to wit, on June 10, 1936, the plaintiff moved to amend his original complaint so as to add allegations of negligence in the Phosphate Department, in which the plaintiff had worked under different conditions, in a different building, and with much of his time being spent out-of-doors.

The respondent respectfully submits that the entire case of negligence in the original complaint, upon the specific charges, are acts and failures with respect to the ventilation of and safety in the Silicate Department. It was the allegedly negligent conditions of that department that is the gist of the complaint. That this cannot be held to be declaratory of conditions in other buildings or locales (as perhaps, cities or countries) seems self-evident. In fact, the evidence disclosed that after the transfer to the Phosphate Department, much of the plaintiff's time each week was spent out-of-doors, where there could be no negligence with respect to ventilation, since there could be no ventilation.

That the complaint as drawn never contemplated the Phosphate Department or conditions therein, is concluded by the statement of counsel for the plaintiff, Mr. Turtur, (R. 128) to the effect as follows:

> "Mr. Turtur: And the only reason why I didn't want to see any other portion except the Silicate Department was because I didn't know until the day before the depositions were taken that this Phosphate room came into the picture.
>
> "The Court: In other words you didn't know that the statute had run.
>
> "Mr. Turtur: No, not until one day before did Mr. Maty mention the phosphate department."

Despite the fact that the trial court allowed the amendment, it is apparent from the record that grave doubts arose in the court's mind with respect to its validity and good faith. This is amply illustrated by excerpts from the record expressing the court's opinion as follows:

That:

> "* * * your phosphate is composed in some attempt to meet the Statute (R. 116)."

That:

> "You are trying to give a false cause of action in order to avoid the Statute (R. 116)."

That:

> "I personally question the good faith of your change: I think it is made simply to avoid the Statute (R. 118)."

That:

> "The conclusion is inescapable that you are composing this Phosphate argument to meet the Statute (R. 129)."

The court further said:

> "You charge negligence in the operation of one department, and as a result of that negligence you say injury took place. It now appears that you wish to charge negligence in another department" (R. 118).

And further:

> "I personally question the good faith of your change. I think it is made simply to avoid the Statute, but leaving that out of consideration, you have the legal situation of charging negligence in one department, which turns out to be barred by the Statute, and wish to amend and charge negligence in another department and under different conditions" (R. 118-119).

The fact that the complaint did not contemplate the Phosphate Department is established on its face, and by the foregoing, but it is further established by the fact that the plaintiff's expert on ventilation, one Laurens Pohlman, who inspected the respondent's premises carefully on May 11, 1936, or four days before the case first went to trial—confined his examination to the Silicate Department and neither examined nor testified to any conditions with respect to the phosphate Department (R. 695). This was in spite of the fact that the respondent advised the plaintiff by its answer, filed on December 15, 1935, that it pleaded the statute of limitations and that the plaintiff's employment in the Silicate Department terminated on November 1, 1932.

The instant case, therefore, presents the anomalous situation of a case that, on the complaint, was bad when started—and to which the statute of limitations was a perfect defense—and had been pleaded. In review, the last exposure in the Silicate Department was November 1, 1932, and suit had been started October 1, 1935. Hence the case, on its face, was barred. Following this defective suit an amendment was asked to include the Phosphate Department, where the exposure terminated on October 23, 1933. This amendment was asked at the time of the trial, *i.e.,* on June 10, 1936, and in the face of the two year statute of limitations of the State of New Jersey, was also barred when submitted.

For emphasis, the respondent briefly sums up the foregoing. The original suit as filed, was bad because of the statute of limitations; the amendment, when asked, was bad for the same reason, and the granting of the amendment had the resulting effect of giving life to a suit that was invalid and must have been non-suited. This was not the mere appending of an amendment barred at the time of the motion to a suit that was originally good, but was rather the appending of an amendment, also barred at the time of the motion, to a suit that was barred when instituted and to which the statute of limitations had been pleaded and was a perfect defense.

It is respectfully urged as self-evident, that the gravamen or gist of the allegations of negligence with respect to ventilation under allegedly hazardous conditions in the Silicate Department is a different cause of action from that of similar conditions in the Phosphate Department, located, as it was, in a building at least five hundred feet away from the Silicate Department. The exposure was different; the plaintiff's employment was different, and was with liquids; the ventilation was different; it was in a different building, and with the majority of the work performed out-of-doors. Certainly had the transfer of the plaintiff on November 1, 1932, been to a plant in another State, there could be no identity of "gist"; yet, this is not a hypothesis more extreme under the circumstances. When the limits of the negligence, as alleged, are reached, it is submitted that it makes no difference how far or how near the plaintiff may be—if he is in fact removed from the effects of that negligence as alleged. The injury here is alleged as a result of certain conditions; the specific acts of negligence or omissions amounting to negligence are perhaps the most important factors in the complaint and it is submitted that an amendment, allowing proof of an entirely different exposure, should not be allowed.

The test for determining whether it is the same cause of action, is laid down in *Salyers* v. *U. S.*, 257 Fed. 255, as follows:

> "Will the same evidence support both? And will a judgment against one bar the other?"

Unquestionably, the amendment, with respect to the original complaint, does not meet this test.

In the case of *De Lello* v. *Manufacturers Land & Imp. Co.*, 11 N. J. Misc. 164, where the plaintiff charged the defendant with negligence in failing to keep a sidewalk in repair, the following situation is presented. After the statute of limitations had run against the action, the plaintiff sought to amend the complaint by alleging that the defendant was negligent in the construction of the sidewalk by reason of which the sidewalk became raised and broken. The amendment was not allowed. After applying the test laid down by Judge Ackerson in the case of *O'Shaughnessy* v. *Bayonne News,* 109 N. J. L. 271, Judge Eldridge said on p. 167:

> "Applying this test, we think the amendment cannot be allowed. The charge in the amended complaint is not substantially the same wrong with respect to the same transaction as that alleged in the original complaint. The wrong in one is failure to repair and maintain, while the wrong in the other is failure to properly construct. Nor is it the same matter more fully and differently laid, but rather it is a different matter setting up a different cause of liability. Neither can it be said that the gist of the action nor the subject of the controversy is the same.
>
> "Bouvier's Law Dictionary defines 'gist' to be 'the essential ground or object of the action in point of law, without which there would be no cause of action * * * the cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of the suit without which there is no cause of action.'
>
> "In the light of this definition or of these definitions, the gist of the action set up in the amended complaint is negligence arising from defective construction of the sidewalk, from which injury resulted to the plaintiff. That is not the same as the gist of the action attempted to be set up in the original complaint. To permit the amendment, therefore, would set up a new cause of action, and hence the amendment cannot be allowed."

In *Williams* v. *William B. Scaife & Sons Co.,* 227 Fed. 922 (N. J., 1915), the Court says as follows:

> "It is the defendant's contention that the cause of action set forth in the original complaint is a different one than that set forth in the amended complaint, and that the Statute of Limitations as applied to such new or different cause of action treats the action as commenced when the amendment was incorporated into the pleadings, and not as begun when the action itself was commenced. Undoubtedly, if a new and different cause of action is stated in the amended complaint, the rule which the defendant invokes would apply, and so far as the Statute of Limitations is concerned, it will be a bar to the new cause of action to the same extent as if the amendment were a new and independent suit. Union Pacific Ry. Co. *v.* Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983. On the other hand, if no new or different cause of action is introduced, and if the amended complaint does not set up any different set of facts as the ground for the action, the amendment will relate back to the beginning of the suit."

In *Rygiel* v. *Kanengeiser et al.* (N. J.), 176 Atl. 605, cited by the plaintiff, the Court says as follows:

> "It is indisputably the rule that an entirely new and different cause of action cannot be introduced after the statute has tolled the action."

In view of the plaintiffs' counsel's frank admission made during the trial and referred to (*supra*), that (R. 128) "and the only reason why I didn't want to see any other portion except the Silicate Department was because I didn't know until the day before the depositions were taken that this phosphate room came into the picture", must it not be said that the amendment here is introducing a new cause of action and therefore cannot be admitted.

The cases of *O'Shaughnessy* v. *Bayonne News Co.,* 109 N. J. L. 271; *Rygiel* v. *Kanengeiser,* 114 N. J. L. 311, and

Magliaro v. *Modern Homes, Inc.*, 115 N. J. L. 151, decisions of the courts of the State of New Jersey, cited by the petitioner, will be treated under Point C. It is believed, however, that they are entirely in harmony with the decisions cited by the Respondent and, in fact, support its position.

It is, therefore, respectfully urged that the opinion of the Circuit Court of Appeals in affirming the judgment of the trial court, on the ground that the amendment was improperly received, and that the action was barred by the Statute of Limitations, is in accord with the local decisions, both as to applicability of the Statute of Limitations, and the right to amend.

Point B.

The decision is in accord with the weight of authority and the decisions of this Court.

The facts and chronology have been established in the discussion under Point A, and it is deemed unnecessary to again set them forth. Under similar conditions, however, the various courts, including this Honorable Court, have ruled in conformity with the position taken by the respondent.

In 25 Cyc. 1309, the rule is set forth as follows:

> "*When original declaration fails to state cause of action.*—Where the declaration states no cause of action whatever, it will not arrest the running of limitations; and an amendment made after the bar of the statute is complete will be regarded as the beginning of the action, in reckoning the statutory period of limitations."

Similar facts were presented in *Allis-Chalmers Mfg. Co.* v. *City of Chicago,* 130 N. E. 736, where the court held as follows:

> "When a cause of action is stated for the first time in an amended count of a declaration, the suit is regarded as having been commenced as to such cause of action at

> the time of filing the amended count, and, if the Statute of Limitations has then run, it will be a bar to the new cause of action stated in the amended count."

37 *Corpus Juris,* p. 1071, Sections 508 and 510, cited by the petitioner, seem to confirm the position of the respondent. Further, it is apparent that the situation at hand comes directly under Section 516, also found in 37 *Corpus Juris,* p. 1078 as follows:

> "*When original declaration fails to state cause of action.*—Where the declaration states no cause of action whatever, it will not arrest the running of limitations; and an amendment made after the bar of the statute is complete will be regarded as the beginning of the action, in reckoning the statutory period of limitations."

The question is specifically met again by the courts in *Taylor* v. *Swift & Co.,* 219 Pac. 516, where the court held that the original invalid petition was not revived by the filing of an amendment and quoted with approval the following language found in *Railway Co.* v. *Bagley,* 69 Pac. 189:

> "Will the filing of a petition which states no liability against the defendant arrest the statute? Or, rather, did the filing of an amendment which stated a cause of action relate back to the filing of the original petition, wherein no cause of action was alleged? Our Code makes liberal provisions for amending pleadings both in form and in substance, but no amendment is permissible which changes substantially the claim or defense. (Civil Code, Chap. 139; Gen. Stat. 1915, Chap. 4573.) So it was held in A. T. & S. F. Rid Co. *v.* Schroeder, 56 Kan. 731, 44 Pac. 1093, that a new and distinct cause of action, barred by the statute, could not be engrafted on a petition by way of amendment so as to deprive the defendant of the defense of the Statute of Limitations."

In *Chennault* v. *Stovall et al.*, 160 So. 146, where is found a situation on all fours with the instant one, in that an action *in tort* was brought against the defendant, alleging a conspiracy to have occurred on February 1, 1932, suit was brought on January 16, 1934. Faced by a one year statute, which clearly eliminated his claim, plaintiff attempted to amend by changing the date of the last conspiracy to February, 1933, which tender was refused by the Court. The language is as follows:

> "The original petition, as it stood, filed in 1934 upon a tort alleged to have been committed in 1932, without any showing of delayed knowledge, was upon an action, on the face of the pleadings, forever barred by the prescription of one year, and therefore set forth no cause or right of action. In the amended petition it is alleged that, owing to a clerical error, the year 1932 was written instead of 1933. Granting this to be true, nevertheless the action on its face was barred.
>
> "In the case of National Park Bank *v.* Concordia Land & Timber Company, 159 La. 86, 105 So. 234, 240, the rule is stated as follows: 'The authorities are numerous to the effect that where the original bill of complaint, or petition, is brought before the prescriptive period has expired, or petition is amended after the expiration of the prescriptive period so as to state a cause of action, the amendment will relate back to the time of filing the original pleading and save the action from the bar of the Statute of Limitations, but that it (the amendment) will not relate back to the time of the filing the original pleadings so as to save the action from the bar of the Statute of Limitations, where the original pleading fails to state any cause of action whatever."

This line of cases is to be distinguished from those cases where a plaintiff mistakenly alleges the date on which his right of action accrues. In other words, if there is but one act of negligence, a mistaken pleading, with respect to that act, might be amended, but where the negligence alleged is necessarily an entirely different act, involving different buildings, different departments, different conditions and different dates of exposure, no leniency should be shown with respect to amendments of this character. In *Salyers* v. *U. S.*, 257 Fed. 255, where the plaintiff had several causes of action and merely alleged one of them in his complaint, the Court refused to allow an amendment after the statute had run as to the amended claim. The language follows:

> "But we have here an instance where the plaintiff having two causes of action has stated but one of them in his original petition, although the amount demanded is large enough to cover both of his causes of action, and then seeks by amendment to set up facts vital to and constituting the second cause of action. An amendment setting up such new and second cause of action will not relate back to the date of the original petition, but will be governed by its own date, and if the bar of the Statute of Limitations or a bar to the right to maintain such new cause of action has intervened, the new cause of action must fail."

Pennsylvania, in the case of *Lane* v. *Sayre Walter Co.*, 69 Atl. 1126, held that an amendment tendered after the statute had run should be refused and accordingly refused to correct a defective pleading by saying as follows:

> "It was held that a new cause of action cannot be introduced, or new parties brought in, or new subject-matter be presented, or a fatal and material defect in the pleadings be corrected after the Statute of Limitations has become a bar. That there was a fatal and material defect in the original pleadings was decided by this Court when the case was here before, and we are not familiar with any authority that would permit an amendment which in effect introduces a new cause of action and cures a fatal and material defect in the pleadings after it is pointed out by this Court on appeal

> and when the Statute of Limitations has become a bar. There should be a finality to all litigation, and the judgment entered by this Court when the case was before us three years ago was final on all questions raised by the original pleadings. The Statute of Limitations is a bar to a recovery on any new suit subsequently brought, or, what amounts to the same thing, an attempt to institute a new action by amending the original pleadings."

In *Union Pacific R. R. Co.* v. *Wyler*, 158 U. S. 285, 39 L. Ed. 983, the following set of facts was presented to this Court. The plaintiff, on September 25, 1885, entered suit against his employer in Mississippi for damages for personal injuries, alleged to have been caused by the negligence of his employer in employing as his assistant, a known incompetent man. The case was removed to the Federal Court of Missouri, and on October 30, 1885, the plaintiff amended his complaint to set up the direct negligence of the defendant "and his agents". On November 2, 1888, the plaintiff filed an additional amended complaint setting up a Kansas Statute eliminating the fellow-servant rule in cases of this character.

The Court said:

> "The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies."

And further:

> "The latitude of amendment allowed the plaintiff cannot be permitted to work injustice to the defendant, or to deprive him of any just and rightful defense. The plaintiff may introduce a new cause of action by amendment; but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for that cause of action, at the time of making the amendment."

The only criticism of the rule in the *Wyler* case referred to in the petitioner's brief (p. 18) and cited from the case of *U. S.* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, is that the testing of an invalid amendment shall no longer be deemed to be merely a "departure from law to law". Inferentially, the *Memphis* case (*supra*) seems to include departure from fact to fact, and reiterates the rule of the *Salyers* case (*supra*)—

> "Will the same evidence support both? And will a judgment against one bar the other?"

Again, as in the discussion under Point A, no references will be made here to the cases cited by the petitioner, as these will be covered under Point C. It is, however, respectfully submitted that there is no conflict, and that the general weight of authority, as well as the decisions of this Court, support the opinion of the Circuit Court of Appeals of the Third Circuit.

POINT C.

The reasons advanced for the issuance of writ of certiorari are insufficient.

The first reason advanced by the petitioner as a basis for his petition for a writ of certiorari, is that there is a conflict between the decision in the instant matter and the local decisions of the State of New Jersey. On the contrary, it is submitted that not only do the cases cited by the respondent represent the true State of the law, rejecting this alleged conflict, but that the cases cited by the petitioner are not in point. Attention is called to the fact that *all* of the cases cited by the petitioner as controlling, concern a single transaction such as a specific act of negligence or a specific contract obligation. Further, in every case cited by the petitioner the original suit was begun seasonably, before the Statute of Limitations had become a bar. Nowhere in the petitioners' citations is the situation found that prevails here—where entirely different acts or omissions are attempted to be predicated on a suit that was invalid when instituted.

In *O'Shaughnessy* v. *Bayonne News Co.,* 109 N. J. L. 271, 154 Atl. 13, the plaintiff sued for personal injuries sustained as a result of being struck by the automobile of the defendant. He commenced his action in time, and thirteen months after the Statute had run, asked to amend to change his position at the time of the accident from that of alighting from the truck that caused the injury to crossing in front of it; this was allowed. The Court said:

> "It is quite generally held that if the identity of the transaction forming the cause of action originally declared upon is adhered to, an amendment is not originally regarded as substantially changing the plaintiff's claim or as stating a new or substantially different cause of action. * * *"

And further:

> "The proposed amendment would merely change the position of the plaintiff at the time he claims to have been injured by the negligent starting of the automobile."

In *Rygiel* v. *Kanengeiser,* 114 N. J. L. 311, 176A 605, an action for personal injuries was instituted, setting forth the date of the accident as May 20, 1931. *The suit was started in time,* but on November 25, 1933, after the Statute had run, an amendment was asked to change the date of the accident to the one following that originally alleged, *i. e.,* to May 21, 1931. A non-suit was granted which was reversed by the Court of Errors and Appeals. Said the Court:

> "It is indisputably the rule that an entirely new and different cause of action cannot be introduced after the statute has tolled the action. * * *"

And further:

> "The amendment merely corrected the erroneous allegation in the complaint of the date when the cause of action arose * * *."

Again:

> "Where a plaintiff, by amendment, sets up no new matter or claim, but merely restates in a different form, more correctly and specifically, or more clearly and concisely, the same cause of action declared in the original complaint, or merely avers that, through mistake, the time is erroneously stated in the complaint, it is not the statement of a new or different cause of action, and the statute will not avail for the period between the original and amended pleadings. * * *"

In *Magliaro* v. *Modern Homes, Inc.,* 115 N. J. L. 151, 178A 733, the only other local decision cited by the petitioner, the situation is again the same. Here, the plaintiff was allowed to amend in a suit *in assumpsit* for breach of contract to show that payments under the contract were a condition precedent to his completing the work.

All these cases concern one set of circumstances about which there can be no question—as an automobile accident, or a broken contract. In the *tort* actions, the negligence alleged is one unusual bit of action, and the facts that go to make it up are subject to proof, within reason, whenever or wherever they occurred. There is no similarity, however, to a case, as here, where the negligence alleged is an act, or are acts, of omission, and where that omission is referable to a particular place. In the instant case, it is not mere inadvertency; it is rather an attempt, long after the statute had run, to swing the complaint over to a different set of conditions, concerning which plaintiff's counsel knew nothing at the time of the filing of the complaint (R. 128), and therefore could not have included in the complaint, and did not in fact intend to include therein.

It is respectfully urged that the cases cited represent an entirely different set of circumstances, and that, upon close scrutiny, they must be taken as supporting the position of the respondent.

The second reason for the allowance of the suit, as suggested by the petitioner, is that there is a conflict between this decision and the general weight of authority, together with the decisions of this Honorable Court. While the respondent has no quarrel with the general reason as such, it is submitted that the necessary conflict is not present and that accordingly, as with respect to local law, no reason exists for the granting of a writ in this case.

In reviewing the cases cited, it is found that each and every one concerns one particular transaction about which there can be no question. In *American Cotton Oil Co.* v. *Saluda Oil Mill Co.,* 105 S. C. 317, a suit was filed with respect to a shipment of goods, allegedly made on January 24th. *The suit was started in time,* and an amendment was allowed to change the date of the shipment to the correct one, which was shown to have been some few days later than that originally alleged.

Grayson v. *Lynch,* 163 U. S. 468, 41 L. Ed. 230, is a suit for damages based on the infection of the cattle of the plaintiff from contact with diseased cattle of the defendant. It was impossible to show by exact proof precisely where the infection took place, as the cattle mingled on the open range. The court said, in following Chitty on Pleading:

> "Where the place of doing an act is precisely alleged, if the description be wholly immaterial, the ground of charge or of complaint not being local, the description may perhaps be rejected as surplusage; as if in trespass for taking goods, the declaration were to allege that they were taken 'in a house' it would seem to be sufficient to prove that they were taken elsewhere, unless indeed a local trespass as to the house be laid in the same court."

Baltimore & Potomac R. R. Co. v. *Cumberland,* 176 U. S. 232, 44 L. Ed. 447, is a case in which an allegation that there was no light on a locomotive tender was held not to be a substantial variance with proof that the light was so small as to be insufficient.

N. Y. C. & Hudson River R. R. Co. v. *Kinney,* 260 U. S. 340, 67 L. Ed. 294, is also cited by the petitioner. In that case the plaintiff, *filing suit in time,* was allowed to amend, after the expiration of the statute, to show that the defendant was engaged in interstate commerce, at the time of the accident. The court pointed out:

> "The original complaint set forth facts that would have given a cause of action at common law, under the statutes of New York or the act of Congress, as one or another law might govern. * * *"

In *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 77 L. Ed. 619, the plaintiff filed a claim for over-payment of income taxes for 1922 and 1923. The Government refused payment on the ground that the original claims were too vague and indefinite and that the amendment came too late. The court allowed the amendment, since the suit was "seasonably filed".

Hamilton Brown Shoe Co. v. *Wolfe Bros. & Co.,* 240 U. S. 251, 60 L. Ed. 629, merely recognizes the power of this Court to review a final judgment of the Circuit Court of Appeals by certiorari, although certiorari had once been refused during interlocutory proceedings.

Forsyth v. *Hammond,* 166 U. S. 506, 41 L. Ed. 1095 (1897), is a case of the annexation of territory to a city. The question presented concerns the power of the Supreme Court of the United States to grant certiorari before a final judgment was had in the Circuit Court, and, is accordingly neither disputed nor in point.

Van Der Weyde v. *Ocean Transport Co., Ltd., et al.,* 297 U. S. 114, 80 L. Ed. 515, is, to the respondent's mind, so clearly not in point that it is believed to be inadvertently cited and hence will not be discussed.

None of the foregoing decisions, either from the facts or from the opinion, concern a case such as the instant one. In each of them, the transaction sued upon was one distinct, isolated transaction, and was not, as here, two or more separate, unrelated actions. By analogy, to allow an amendment to change the date of an admitted automobile accident from May 20 to May 21 (*Rygiel* v. *Kannengeiser, supra*), is entirely dissimilar to the allowing of an amendment from a cause of action, for illustration, in which a plaintiff might bring suit against a gas company for injuries sustained by being run down by an automobile owned by it—to an action for injuries to health due to gas leakage from the pipes of that company. The petitioners' citations are in the first category, as illustrated by the *Rygiel* case; the instant case lies within the second. It is, therefore, respectfully submitted that there is no conflict between the decision here and the weight of authority or the decisions of this Honorable Court, and that, accordingly, the petitioner's application should be denied.

The respondent, in closing, submits that it has not opposed and does not oppose the motion to allow the petition to be heard on the typewritten record, but respectfully calls the Court's attention to the fact that the record discloses that plaintiff's counsel is employed on a contingent basis, having a forty per cent interest in the cause (R. 773-774), and, accordingly, should join in the petition *in formia pauperis*.

See—

Boyle v. *Great Northern R. R. Co.,* 63 Fed. 539;
Feil v. *Wabash R. R. Co.,* 119 Fed. 490.

It is further called to the Court's attention that the petitioner, who is the only one making the application *in forma pauperis,* is not a citizen of the United States (plaintiff's brief, p. 20) as required by the Act (U. S. C. A., Title 28, Section 832).

Conclusion.

For the reasons given above, it is respectfully submitted that the application for a writ of certiorari should be denied.

Respectfully submitted,

Louis Rudner,
Attorney for Respondent.

Carl E. Geuther,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, ADMINISTRATRIX OF THE ESTATE OF GEORGE MATY, ALSO KNOWN AS GEORGE MATEY,
Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 378

SUSIE MATY, Administratrix of the Estate of George Maty, Also Known as George Matey,

Petitioner,

vs.

GRASSELLI CHEMICAL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

Introductory Statement.

These proceedings arise out of an action at law instituted in the United States District Court for the District of New Jersey by the original plaintiff, George Maty, now deceased. He sued the respondent to recover damages for lung injuries alleged by him to have been caused by exposure to Soda Ash (chemically known as Sodium Carbonate,

R. 314, 325 and 331) dust while working as a furnace operator and general worker in the Silicate Department of respondent's plant in Grasselli, New Jersey. The respondent by its Answer pleaded, among other defenses, that the cause of action framed by the complaint was barred by the two year Statute of Limitations of the State of New Jersey. During the trial plaintiff was permitted to amend the complaint so as to charge the respondent with negligence in its Phosphate Department as well as in its Silicate Department, the said amendment being allowed over objections on the part of the respondent predicated upon the Statute of Limitations of the State of New Jersey both with respect to the cause of action set out in the original complaint as well as to the new cause of action so created by the amendment. The trial of the cause resulted in a verdict for the plaintiff (R. 811). Upon the conclusion of the taking of testimony, respondent moved for the direction of a verdict in its favor upon several grounds (R. 708). After protracted argument the motion was denied with reservations—the trial judge reserving the right to direct a verdict for the respondent upon further study of the record. In this connection the trial judge made the following statement (R. 722):

> "I am going to let this case go to the jury because we have been here so long, but I am telling you, Counsel, that my view of the matter is that any verdict they might bring in will have to be set aside by me."

Upon application of the respondent, the trial judge granted a rule to show cause why the verdict in favor of the plaintiff should not be set aside and a verdict entered in behalf of the respondent notwithstanding the verdict for the plaintiff, or that in the alternative a new trial be granted (R. 812). Upon the argument of the Rule to show cause counsel for the plaintiff stipulated and agreed that in the event the trial judge concluded to set aside the verdict of the jury, a directed verdict be entered for the respondent and that judgment for the respondent follow (R. 757). The argument resulted in the vacating of the order and judgment for the plaintiff and the entry of a verdict and judgment for the respondent (R. 784 and p. 818). The ruling of the trial judge was predicated primarily upon the failure of the plaintiff to sustain his charge of negligence in that he had failed to prove knowledge on the part of the respondent, knowledge of probable injurious effects from the inhalation of Soda Ash dust being an essential element in seeking to establish the charge of negligence, and also upon the doubtful proofs as to whether the plaintiff had established that the negligence charged was the proximate cause of the lung condition from which the plaintiff was suffering, and further upon the doubtful proofs as to whether the plaintiff was in fact exposed to Soda Ash dust while he worked in the Phosphate Department (R. 783 and 784). An appeal was thereupon taken to the United States Circuit Court of Appeals for the Third Circuit which affirmed the judgment of the District Court, but on grounds other than those relied upon by the trial judge in entering judgment for the respondent (R. 821-823). 89 F. (2d) 456. Circuit Judge Thompson, in speaking for the Circuit Court, said as follows (R. 821 and 822):

> "* * * The learned trial judge * * * concluded that the plaintiff had failed to prove knowledge on the part of the defendant, and relying upon our ruling in Pennsylvania Pulverizing Co. *v.* Butler, 61 F. (2d) 311, entered judgment for the defendant.
>
> "We do not deem it necessary to review the evidence as to the knowledge of the defendant in view of our conclusion that a verdict should have been directed for the defendant because of the two year statute of limitations. The original bill of complaint was filed October 1, 1935. The plaintiff alleged therein that he was employed as a furnace man in the silicate department of the defend-

> ant's plant, that the defendant failed to provide him with a safe place to work, * * *. It was shown that sometime in 1932 the plaintiff was transferred to the phosphate department. The action based upon negligence in the silicate department was therefore outlawed by the New Jersey two year limitation period.
>
> "At the trial the plaintiff undertook to prove that his injuries were sustained through the negligence of the defendant in the conduct of its phosphate department and obtained leave of court to amend his original bill of complaint so as to conform to the evidence so produced. We think the court should have refused to allow the amendment. The cause of action set forth in the amendment was a different cause of action from that set forth in the original complaint and, therefore, could not be introduced after the statute of limitations had run. * * * The negligence alleged in the amendment involved a different act, different buildings, departments, conditions and dates of exposure. * * *"

Petitioner applied for a rehearing before the Circuit Court and her petition was denied (R. 824). Petitioner thereupon filed her petition with this Court charging that the Circuit Court of Appeals for the Third Circuit was in error in its adjudication upon the single question of the applicability of the Statute of Limitations upon which it passed judgment, the Circuit Court having held it to be unnecessary to review the other legal and factual questions which were presented and argued before it upon the appeal. The Circuit Court did not therefore in any respects pass upon these other legal and factual questions. A writ of certiorari was granted by this Court upon the petition of petitioner (R. 824). The Statute of Limitations constitutes the sole issue which was presented and argued in petitioner's petition for writ of certiorari and brief. It also represents the single issue upon which the writ was granted by this Honorable Court (Petition for Writ of Certiorari and Brief, pp. 4 and 5).

Discussion of Pleadings.

A complete understanding of the pleadings is of fundamental importance in the consideration of the legal question presented upon this review.

This action was commenced on October 1, 1935. The summons annexed to the complaint is tested as of that date (R. 787). The summons and complaint were served on the respondent on October 3, 1935 (R. 789).

Paragraph 1 of the complaint alleges generally that the plaintiff was in the employ of the respondent at its plant in Grasselli, New Jersey in November 1933 and for sometime prior thereto (R. 788). The respondent by its answer admitted that the plaintiff was for a time employed by it at Grasselli, New Jersey, but denied that he was so employed in November 1933 (R. 793).

Paragraph 2 of the Complaint alleges that the plaintiff was employed as a furnace man, operator and general worker in the Silicate Department of defendant's plant (R. 738). In answer to this paragraph, defendant admitted that plaintiff was "for a time employed as a furnace man in the silicate department of defendant's plant, but denies that he was employed in said department after November 1, 1932" (R. 793).

Paragraph 4 of the complaint charges that *"during the course of his employment in and around the said department"*, plaintiff came into contact with certain substances to which he was exposed and which he inhaled, and that as a result of the negligence charged, he became incapacitated in November 1933 (R. 788). (Italics ours.)

Except as clarified in the above respects as to the time, place and nature of plaintiff's employment, the respondent's answer constituted a general denial, and set up five separate defenses, the Third and Fourth Separate Defenses dealing specifically with the Statute of Limitations. Respondent specifically pleaded affirmatively that the cause of action framed by the complaint which dealt exclusively with the Silicate Department of the respondent's plant at Grasselli, New Jersey, was barred by the two year Statute of Limitations of New Jersey (R. 793 and 794).

Paragraphs 1, 2 and 4 of the complaint contain the pertinent parts thereof insofar as the present review is concerned (R. 788). In and by these paragraphs plaintiff set forth a cause of action charging acts of negligence while he was employed as a furnace operator in the Silicate Department of respondent's plant at Grasselli, New Jersey. Paragraph 1 of the complaint is general in nature and refers to plaintiff's employment at the plant of the respondent. Paragraph 1 in referring to respondent's plant is limited by paragraphs 2 and 4 of the complaint wherein specific and particular reference is made to the Silicate Department wherein plaintiff worked as a furnace operator. The complaint does not by its language cover any other department of respondent's plant except the Silicate Department. It was admitted by plaintiff's counsel in open court that when the complaint was prepared by him it was intended to cover the Silicate Department only and not the Phosphate Department. This will at once appear from the following colloquy between plaintiff's counsel and the trial judge (R. 128):

> "Mr. Turtur: And the only reason why I didn't want to see any other portion except the Silicate Department was because I didn't know until the day before the depositions were taken that this Phosphate room came into the picture.
>
> "The Court: In other words you didn't know that the statute had run.
>
> "Mr. Turtur: No, not until one day before did Mr. Maty mention the phosphate department."

The Depositions referred to by counsel were taken on May 15, 1936 (R. 1). In connection with the above colloquy, the trial judge said to plaintiff's counsel (R. 129):

> "The Court: You see the conclusion is inescapable, that you are composing this phosphate argument to meet the statute."

The distinction between the Silicate Department and the Phosphate Department becomes important by virtue of the following facts: While working in the Silicate Department, the plaintiff was employed as a furnace operator (R. 5). Plaintiff testified that he worked in this Department until the Winter of 1932 when he was transferred to the Phosphate Department (R. 30). The original shop records of respondent establish that the transfer was made on November 1, 1932 (R. 592). The Phosphate Department is located in a separate and independent building located about five hundred feet from the Silicate Department. He had different bosses there (R. 61). After this transfer to the Phosphate Department, plaintiff never returned to the Silicate Department (R. 61). While employed in the Phosphate Department plaintiff worked as a general worker. He testified that he worked outdoors three days a week and indoors two days a week and that his work was of a wholly different character from that in the Silicate Department (R. 31). Since the plaintiff left the Silicate Department on November 1, 1932, any cause of action charging negligence as to that Department was barred by the Statute of Limitations of New Jersey on and after November 2, 1934. The suit in this cause was instituted on October 1, 1935,—almost a year after any action with respect to that Department was barred by the Statute of Limitations. In other words, the cause of action framed by the complaint and in fact intended by plaintiff's counsel to be framed and covered by the complaint had been barred almost a year before the suit was commenced. The plaintiff himself testified that he did not get sick in the Phosphate Department (R. 36).

The complaint alleged generally that plaintiff was employed in respondent's plant until November 1933, and alleged specifically in paragraphs 2 and 4 that while employed at respondent's plant, he was employed as a furnace operator in its Silicate Department (R. 788). Respondent by its answer specifically and particularly stated that plaintiff was not employed in the Silicate Department after November 1, 1932, and by its Third and Fourth Separate Defenses set up the two year Statute of Limitations and thereby gave particular notice that the cause of action set forth in the complaint was barred on the very day the suit was commenced (R. 793 and 794). Plaintiff filed his reply denying the allegation of the respondent's answer and joining issue thereon (R. 795).

A trial of this cause was commenced on May 19, 1936, but after a day of testimony was terminated by a mistrial in order to allow other cases of shorter duration to be tried. The trial judge at first limited the proofs to the Silicate Department, but subsequently allowed the plaintiff to amend his complaint so as to include the Phosphate Department. No formal amendments to the complaint were filed (R. 89 and 90). In anticipation of a new trial on June 9, 1936, respondent gave plaintiff notice of a motion to limit the proofs during the trial to the Silicate Department on the grounds set forth in the notice (R. 810 and 811). The motion of respondent to limit proofs was originally granted. The trial judge held that paragraph 1 of the complaint was limited by Paragraph 2 thereof (R. 95 and 96). Plaintiff thereupon applied for leave to amend the complaint so as to include the Phosphate Department. Considerable argument ensued during the course of which the trial judge said (R. 118 and 119):

> "The Court: * * * I personally question the good faith of your change. I think it is made simply to avoid the Statute, but leaving that out of consideration, you have the legal situation of charging negligence in one department, which turns out to be barred

> by the Statute, and wish to amend and charge negligence in another department and under different conditions. * * *
>
> The Court: No, I would like to see any case that would permit such a radical departure from the original cause of action."

The amendment of the complaint was allowed with reservations and serious doubts on the part of the trial judge in the correctness of his ruling (R. 107-143).

By virtue of the motions made with respect to amendments to the complaint, an amended complaint was filed by plaintiff (R. 803-805). Plaintiff alleged in paragraph 2 that he was employed as a furnace man, operator and general worker in the Silicate Department and Phosphate Department of the respondent's plant, and in Paragraph 4 he alleged that "during the course of his employment in and around the said department and/or departments", he suffered certain injuries. It is to be noted that even after being allowed to amend his complaint, the plaintiff pleads with mental reservations. He does not charge negligence in any absolute and out and out terms in both the Silicate and Phosphate Departments, but refers to *"the said department and/or departments."* (Italics ours.) At that late stage plaintiff expresses great uncertainty in his pleadings with respect to whether he was injured in one department or in the other department. The plaintiff himself insisted and testified that he got sick in the Silicate Department and not in the Phosphate Department (R. 36).

Respondent filed an answer to the complaint as amended (R. 805-808). It expressly reserved all objections and exceptions taken by it during the course of the trial with respect to the amendments to the complaint. It admitted that plaintiff was employed as a furnace worker in the Silicate Department until November 1, 1932, and that thereafter he was employed in the Phosphate Department until October 23, 1933. Respondent pleaded affirmatively the Statute of Limitations (R. 806, 807).

Discussion of Pertinent Facts in Relation to Pleadings.

Plaintiff worked in the Silicate Department as a furnace operator until November 1, 1932 (R. 592). He was transferred on that date to the Phosphate Department where he worked until he terminated his employment in October 1933. The Phosphate Department is located in a building entirely separate and independent from the building wherein the Silicate Department is located, and about five hundred feet away (R. 61). After this transfer, plaintiff never returned to the Silicate Department (R. 61). While in the Phosphate Department he worked as a general laborer (R. 591-597). In the Silicate Department he operated furnaces and took various steps in connection with the manufacture of silica glass. This product is manufactured out of Soda Ash (Sodium Carbonate) and silica sand. In the Phosphate Department, he worked four days on the outside near the water front and one day a week indoors (R. 594 and 625). The plaintiff himself testified that he worked outdoors three days a week and two days a week indoors (R. 72). While working in the Phosphate Department, the plaintiff did not handle Soda Ash at all. In this Department Soda Ash is used on the other side of the building from where he worked (R. 592 and 594). In discussing the product Soda Ash (Sodium Carbonate) it is well to understand that we are not dealing with a chemical which is dangerous, poisonous or noxious in character. Soda Ash is an entirely harmless product which has no substantially greater effect on the human system when inhaled than ordinary street dust. It is a mild alkali and is somewhat stronger in alkalinity than Sodium Bicarbonate. It is not in fact or even considered to be a caustic product (R. 314, 325, 330-340; 350-358).

On October 1, 1935, plaintiff commenced this action against respondent charging it with negligence in the Silicate Department. He had left that department on November 1, 1932. The respondent pleaded affirmatively that the cause of action set forth in the complaint was barred by the Statute of Limitations, and respondent further gave plaintiff particular notice by paragraph 2 of its answer that his employment in the Silicate Department had terminated on November 1, 1932. The cause of action framed by the complaint was barred by the Statute of Limitations almost a year prior to the date on which the suit was commenced. The complaint covered only alleged exposure in the Silicate Department and was intended to cover only that department when it was prepared. That fact was admitted by counsel in open court. Plaintiff terminated his employment in the Phosphate Department in October, 1933. On June 10, 1936, plaintiff was permitted to amend his complaint by setting up a new cause of action relating to the Phosphate Department. Any cause of action which plaintiff might have had as to the Phosphate Department was barred on or about November 1, 1935. The result of all the foregoing is that on June 10, 1936, the plaintiff was permitted to resurrect by amendment a cause of action with respect to the Silicate Department which was barred on November 2, 1934, by amending the complaint in an action commenced on October 1, 1935, and further to resurrect by amendment a cause of action with respect to the Phosphate Department which was barred on or about October 24, 1935, by amending the complaint in an action predicated upon the Silicate Department alone commenced on October 1, 1935. Recapitulating, the pertinent dates are:

November 1, 1932—last date of alleged exposure in Silicate Department.

October 23, 1933—last date of employment in Phosphate Department.

October 1, 1935—date of filing suit predicated on Silicate Department.

June 10, 1936—date of amendment to include the Phosphate Department.

Legal Question Presented.

Had the trial judge under the facts and circumstances presented the legal right to allow the plaintiff to amend his complaint on June 10, 1936, so as to include the Phosphate Department and thereby resurrect a cause of action both as to the Silicate Department which was outlawed on the date suit was commenced and as to the Phosphate Department which was outlawed on October 24, 1935? The trial judge on several occasions held that he had no such legal right. He finally did allow the amendment with serious doubts and reservations. The Circuit Court of Appeals for the Third Circuit concluded not to consider the several legal and factual questions presented on the appeal, and held that the trial judge committed legal error in allowing the amendment, and on that ground alone the judgment in behalf of the respondent should be affirmed.

Argument.

The applicable part of the New Jersey Statute of Limitations reads as follows:

> "All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any * * * corporation or corporations within this State, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after." (3 N. J. Comp. St. 1910, p. 3164, Section 3; P. L. 1896, p. 119.)

Perhaps the most excellent decision on the applicability of this statute locally is found in *LaPorte* v. *U. S. Radium*

Corp., 13 Fed. Supp. 263, D. C. of N. J., 1935), decided by District Judge Forman. This case raised the question as to whether the plaintiff in an action at law for damages caused by injuries to the plaintiff's intestate is entitled to an injunction restraining the defendant from pleading the Statute of Limitations as a bar to the plaintiff's alleged cause of action on the ground of equitable fraud. On page 272 District Judge Forman, after setting out the above statute, said as follows:

> "In Thorpe *v.* Corwin, 20 N. J. Law, 311, 317, the Court said: 'The Statute of Limitations makes the lapse of time a positive and legal bar. When once it has begun to run against a person under no legal disability, it pursues its course uninterrupted by any subsequent events; and when the period prescribed by the statute has elapsed, the bar is complete, and its force can neither be strengthened nor impaired by anything that has happened in the meantime. * * * The statute leaves nothing for presumption. Time alone settles the rights of the parties, by the giant force of the statute.'
>
> That is law today in New Jersey. Freeman *v.* Conover, 95 N. J. Law, 89, 112 A. 324."

Statutes of limitation are statutes of quiet, and they are beneficent in that they put an end to disputed claims, prevent litigation, and give rest and repose. No matter what may be the criticism of the casuist, in the eyes of the law these statutes are no longer regarded as harsh, but furnish a defense as meritorious as any other. In *Limpert Brothers* v. *Stitt*, 94 N. J. L. 472, 110 Atl. 832 (E. & A., 1920), Mr. Justice Parker, in dealing with the Statute of Limitations said on page 473 (N. J. L.):

> "As to defendant not being prejudiced, statutes of limitation are in the interest of terminating litigation; defendants are entitled to rely on them, and would be legally prejudiced by their non-enforcement. * * *."

Notwithstanding the formal changes in procedure prescribed by the new Practice Act of New Jersey, the classification of actions at common law and their substantial distinctions as a basis of remedial law still continues. *Willis & Bro.* v. *Gaventa,* 94 N. J. L. 84, 110 Atl. 120 (Sup. Ct., 1920); *Jamouneau* v. *Wetherill,* 98 N. J. L. 80, 118 Atl. 707 Sup. Ct., 1922).

In discussing the facts of the cause at bar and the applicability thereto of cases decided in various jurisdictions and the general statements of law therein contained touching upon the legal question of the right to amend a complaint after the Statute of Limitations has run so as to bar the action, regard must be had to the unequivocal fact that in all of these cases the original cause of action declared in the complaint was *not* barred at the time of the commencement thereof so that the answer filed by the defendant did not set up as a defense the Statute of Limitations, and the Statute of Limitations became available as a defense only on the date when an amendment to the complaint was presented and offered. In the instant case the situation is entirely different and is entirely unlike the facts presented in any other reported case. In the present case which was commenced on October 1, 1935, the cause of action set forth in the complaint had been barred on November 2, 1934, and the respondent by its answer affirmatively declared that the plaintiff did not work in the Silicate Department after November 1, 1932, and that as a consequence the cause of action declared in the complaint was barred by the Statute of Limitations and the Statute was specifically and affirmatively pleaded. The amendment introducing the Phosphate Department and setting up a new cause of action as to that Department was presented and allowed on June 10, 1936, and over phate Department had been barred by the Statute. The two years after the cause of action even as to the Phos-
cause of action as to the Phosphate Department was barred

on October 24, 1935. The original complaint did not in fact or in law cover any department other than the Silicate Department and counsel for the plaintiff admitted in open court that it was not intended to cover any other department.

This distinction is so fundamental as to be dispositive of the legal issues presented. It goes to the very crux of the case. It presents neither the legal situation of a bad complaint corrected by a good amendment, nor a bad amendment incorporated in a good complaint. It is, so far as the Statute of Limitations is concerned, a bad complaint plus a bad amendment, with the surprising and entirely illogical interpretation advanced by the petitioner that as a result both are good.

In examining the cases presented, it will at once appear that none of them are hel[illegible]n respect to this fundamental legal question. Broad and frequently misleading general statements of law will be found, but such statements must be carefully scrutinized because they are helpful only in relation to the particular facts before the Court in these cases.

Circuit Judge Sanborn made a very pertinent statement in the case of *Manhattan Oil Co.* v. *Mosby*, 72 F. (2d) 840 (Eighth Circuit, 1934). He said on page 843:

> "Manifestly, if a cause of action is actually barred by the statute of limitations it cannot be resurrected by inserting it, through amendment, into a petition which states an entirely different cause of action. * * *"

The Original Complaint by its Language Did Not Include the Phosphate Department.

In and by paragraphs 1, 2 and 4 of the complaint, plaintiff set forth a cause of action charging acts of negligence while he was employed as a furnace operator in the Silicate Department of respondent's plant. Paragraph 1 is general in nature and refers to plaintiff's employment at the plant of the respondent, but is limited by paragraphs 2 and 4 wherein specific and particular reference is made to the Silicate Department. In paragraph 4 plaintiff charged that "*during the course of his employment in and around the said department*" (referring to the Silicate Department particularly mentioned in paragraph 2 as the particular place of plaintiff's employment), he came into contact with the substances which he says caused his illness, "all of which was the result of the negligence of the defendant." In paragraph 5 of the complaint plaintiff undertook to particularize with respect to the acts of negligence with which he says the defendant was chargeable in and around the Silicate Department. The complaint does not by its language cover any other department of respondent's plant except the Silicate Department. It is not sufficiently broad and comprehensive by its language from a legal or even theoretical point of view to include the Phosphate Department. To suggest that the complaint as framed includes the Phosphate Department as well as the Silicate Department is to suggest that the complaint as framed includes every other one or more of the numerous departments of respondent at its plant in Grasselli, New Jersey. All of these departments have different operations, involve different products, different buildings and many other different facts and circumstances. In this connection it must be borne in mind that the respondent's answer specifically stated that plaintiff was not employed in the Silicate Department after November 1, 1932 (R. 793). Some of the other departments of the respondent's plant are the following: Shipping (R. 155); Sulphate (R. 162); Sulphur (R. 185); Sulphide (R. 197); Lithepon (R. 205); Glauber's Salts (R. 210); Barium Products (R. 219); Barium Chloride (R. 219); C. & R. Department (R. 220). There are other numerous departments which are not specifically referred to in the Record.

The complaint when prepared was not intended to cover any department of the respondent's plant other than the Silicate Department. The allegations of negligence of which the plaintiff complained, when one considers the proofs offered to sustain such allegations, related solely to the Silicate Department, and dealt with inadequate ventilation, "puffing" of furnaces, holes in the conveyor, etc. The proofs offered with respect to the Phosphate Department were entirely different because plaintiff handled only liquids or wet materials while working indoors one day a week, and he worked in several general capacities as a laborer outdoors and near the water-front four days a week. The Phosphate Department was contained in a building over five hundred feet away from the Silicate Department. The allowance of the amendment whereby the Phosphate Department was added to and became part of the complaint constituted an unqualified change in the gist of the original cause of action in a most material respect.

It must therefore be taken as recognized and accepted as a fundamental premise that the original complaint by its language did not in law and fact and was not intended in fact to include the Phosphate Department. Petitioner's feeble and almost apologetic argument that it did include the Phosphate Department falls of its own weight, and is not tenable particularly in view of plaintiff's counsel's admission in open court that he did not in fact contemplate any department other than the Silicate Department when he prepared the complaint (R. 128). We must therefore proceed to a discussion of the judgment of the Circuit Court that the District Judge committed legal error in allowing the amendment.

I. The Decision of the Circuit Court is in Accord With the Decisions of the State of New Jersey.

In *O'Shaughnessy* v. *Bayonne News Co.,* 9 N. J. Misc. 345, 154 Atl. 13 (1931) (affirmed by the Court of Errors and Appeals in 109 N. J. L. 271, 160 Atl. 696 (1932), the original complaint alleged that plaintiff by the express invitation of the defendants became a passenger in the automobile truck owned by one of the defendants; that the truck was so negligently operated that plaintiff "while lawfully alighting from said automobile truck at or near the intersection of said Grove Street with Eight Street, in said City of Jersey City" was thrown to the ground and suffered injuries. The accident happened on February 25, 1928. The action was commenced in time. The two year statutory period of limitation ran against plaintiff's cause of action on February 25, 1930, or more than eleven months prior to plaintiff's application to amend his complaint. In advance of trial plaintiff moved to amend his complaint by alleging that the operator of the truck negligently and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing Grove Street. The amendment was allowed. It was in connection with these facts and circumstances that Judge Ackerson made the following general observations (Misc., p. 347):

> "It is quite generally held that if the identity of the transaction forming the cause of action originally declared upon is adhered to, an amendment is not ordinarily regarded as substantially changing the plaintiff's claim or as stating a new or substantially different cause of action. So an amendment will not as a rule be held to state a new cause of action if the facts alleged show substantially the same wrong with respect to the same transaction, or if it is the same matter more fully or differently laid, or, if the gist of the action or the subject of controversy remains the same;

and this is true although the form of liability asserted, or the alleged incidents of the transaction may be different. Technical rules will not be applied in determining whether the cause of actions stated in the original and amended pleadings are identical, since in a strict sense almost any amendment may be said to change the original cause of action. 49 *C. J.* 510, 511.

"In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured, or as to the manner of the defendants' breach of duty, without necessarily setting up a new cause of action.

"In the case sub judice the injury charged in the original complaint was alleged to have arisen out of the negligent operation of defendants' automobile. The place where the plaintiff was injured is not the gist of the cause of action."

In *Rygiel* v. *Kanengieser,* 114 N. J. L. 311, 176 Atl. 605 (E. & A., 1934), the action was instituted on February 10, 1932. It was commenced within the statutory period. The complaint charged the defendant with negligence in the maintenance of a stairway, as a result of which plaintiff suffered injuries on May 20, 1931. On November 25, 1933, and during the trial of the cause the plaintiff was allowed to amend his complaint to state that his injuries were sustained on May 21, 1931. The defendant pleaded the Statute of Limitations with respect to the cause of action as amended. The defense was sustained and a nonsuit allowed. On appeal, the judgment on the nonsuit was reversed. It was in relation to these facts and circumstances that Mr. Justice Heher said (N. J. L. p. 312):

> "The ratio decidendi of the cited cases is that an amendment will not, as a rule, be held to state a new cause of action, if the facts alleged show substantially the same wrong with respect to the same transaction, or if it is the same matter more fully or differently laid, or if the gist of the action or the subject of con-

> troversy remains the same. 'Gist' is the essential ground or object of the action in point of law, without which there would be no cause of action; the cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of the suit, without which there is no cause of action." Casavalo *v.* D'Auria, *supra.*
>
> "Where a plaintiff, by amendment, sets up no new matter or claim, but merely restates in a different form, more correctly and specifically, or more clearly and concisely, the same cause of action declared in the original complaint, or merely avers that, through mistake, the time is erroneously stated in the complaint, it is not the statement of a new or different cause of action, and the statute will not avail for the period between the original and amended pleadings."

The case of *Magliaro* v. *Modern Homes, Inc.,* 115 N. J. L. 151, 178 Atl. 733 (E. & A., 1935), is based upon an action in contract. It was instituted within time. In paragraph 1 of his complaint, plaintiff pleaded that he agreed to excavate, lay sewers, fill and construct a road upon defendant's promise to pay to plaintiff 80% of the work completed each month upon presentation to defendant of the engineer's statement certifying the amount of work completed, and performance generally was alleged. The defendant refused to pay plaintiff because it disputed the rock removal and the quantity of the earth excavation certified by the engineer, and therefore pleaded by way of defense that plaintiff failed to perform his contract with the result that defendant was obliged to complete the work at a cost exceeding the contract price. At the trial plaintiff was permitted over objection to amend paragraph 1 of his complaint by restating it as it was originally, and adding that the payment of the monthly estimates was a condition precedent to his proceeding with the work. The defendant objected to the amendment on the ground of that of surprise and that it presented a new cause of action after the running of the Statute of Limitations against the original cause. The amendment was sustained on appeal. Here again it was in connection with the facts and circumstances appearing in the case that Chancellor Campbell quoted with approval the statement hereinabove set out and taken from the opinion of Judge Ackerson in the case of *O'Shaughnessy* v. *Bayonne News Co., supra,* and further said as follows (N. J. L. p. 157):

> "Applying this rule to the case in hand the situation presented is, as before stated, that the plaintiff pleaded the terms of his contract so far as was necessary to present his cause of action under the independent covenant to pay the installment under the contract; the defendant by its counterclaim asserted a subsequent breach of the contract by the plaintiff and sought to recover damages by reason thereof; the plaintiff might well have stood upon the allegations of his complaint as to the terms of his contract but saw fit by the amendment in question to more fully set forth the terms of such contract so as to more safely and surely meet the defendant's cause of action against him under its counterclaim. By so doing he was not substituting a new cause of action. His cause of action remained as it was originally, upon the contract, for breach of its independent covenant to pay an installment of the consideration. The plaintiff instead of amending the complaint might well have moved to amend his reply, or answer (as it should have been) to the counterclaim by asserting the same facts as contained in the amendment in question. This would have met the situation and certainly no substantial complaint could have been made thereto and still the same protective purpose would have been accomplished."

The foregoing cases decided by the court of New Jersey are relied upon by the petitioner to sustain her contentions with respect to the propriety of the amendment of the complaint. In all of these cases and the cases to follow arising out of New Jersey, the cause of action when originally instituted was entirely within time and was not then barred by the Statute of Limitations. In the following New Jersey cases, the courts in considering the legal principles above set out refused to allow the amendments to the complaint.

In *Di Lello* v. *Manufacturers' Land and Improvement Co.*, 11 N. J. Misc. 164 (1933), the complaint charged the defendant with negligence in permitting to exist in the concrete sidewalk a raised and broken condition, and in allowing the sidewalk to become so raised and broken that it became dangerous to the public. The plaintiff claims that he suffered injuries on August 20, 1930. His suit was commenced within the two year period of the Statute of Limitations. More than two years after the alleged accident, plaintiff moved to amend his complaint by alleging that the defendant was negligent in that it carelessly constructed or caused to be constructed the concrete sidewalk in question by reason of which the sidewalk became raised and broken. The amendment was not allowed. Circuit Court Judge Eldredge reviewed the authorities in New Jersey generally, including the case of *O'Shaughnessy* v. *Bayonne News Co., supra,* and said as follows (p. 167):

> "Applying this test, we think the amendment cannot be allowed. The charge in the amended complaint is not substantially the same wrong with respect to the same transaction as that alleged in the original complaint. The wrong in one is failure to repair and maintain, while the wrong in the other is failure to properly construct. Nor is it the same matter more fully and differently laid, but rather it is a different matter setting up a different cause of liability. Neither can it be said that the gist of the action nor the subject of the controversy is the same.

In *Casavalo* v. *D'Auria,* 12 N. J. Misc. 81, 169 Atl. 520; affirmed 113 N. J. L. 328 (1933), the original complaint charged that the defendants "negligently and contrary to their duty in the premises failed to maintain the said stairway in a proper, safe condition, and failed to have any railing on said stairway to protect the users from falling from said stairs into the cellar areaway directly alongside of said stairway, and also failed to properly light the said stairway, so that the said stairway or stoop was not safe for the use of persons lawfully using the same." The suit was commenced within time. After the Statute of Limitations had run, the trial court allowed an amendment to the complaint charging that "defendants having undertaken and having attempted to make the necessary repairs to the stairway or stoop leading to said store, did so in a negligent and careless manner, so that the said stairway or stoop was not safe for the use of persons lawfully using the same." It was held to be error in permitting the amendment since the gist of the original cause of action had been changed. The Court said in this regard (Misc. p. 83):

> "In the instant case, the gravamen of the original complaint was the breach of an alleged duty to maintain the stairway in a reasonably safe condition, while the gist of the cause of action pleaded in the amended complaint is the negligent performance of an assumed duty to make repairs. It therefore follows that there was error in permitting respondent to amend the complaint in the manner indicated."

In considering the foregoing cases it will at once appear that had the instant case been considered by the New Jersey Courts, the amendment would not have been allowed and a verdict would have been directed for the respondent.

II. The Decision of the Circuit Court is in Accord With the Decisions of This Court.

The Circuit Court of Appeals in affirming the judgment of the District Court on the limited ground that the trial judge should not have allowed the amendment to the complaint held that the cause of action set forth in the amendment was a different cause of action from that set forth in the original complaint and, therefore, could not be introduced after the Statute of Limitations had run. The Court held that the negligence alleged in the amendment involved a different act, different buildings, departments, conditions, and dates of exposure. The Court was unquestionably correct in its conclusions in these respects. 89 F. (2d) 456, on page 821. The Circuit Court cited and referred to the case of *Union Pacific Railway* v. *Wyler,* 158 U. S. 285, 39 L. Ed. 983 (1895), solely with respect to the general rule of law that an amendment relates back to the time of the filing of the original complaint where the amendment does not create a new cause of action, but that where the cause of action relied upon in the amendment is different from that originally asserted, the reason of the rule ceases to exist and the rule no longer applies, with the result that the running of the Statute of Limitations against the amendment is not arrested. This general rule of law stands unchallenged and with its original integrity in all the cases decided by this Honorable Court since the decision in the *Wyler* case. The Circuit Court having correctly held that new cause of action was created by the amendment, the general rule of law of relation back to the time of the filing of the original complaint which is still generally and universally accepted was not applicable. *Furthermore and in this connection, it will at once be apparent that even the general rule of relation back to the time of the filing of the original complaint can avail petitioner nothing for the reason that the cause of action set forth in the original complaint was barred by the Statute of Limitations on the day and at the time suit was commenced.* The *Wyler* case laid down certain tests for the purpose of determining whether a new cause of action was created by the suggested amendment, and these tests were predicated upon the determination of whether the theory of the action was changed from fact to fact—representing a departure from fact to fact—or from law to law—representing a departure from law to law. Only in the application of these tests as *absolute* and *invariable tests* has the law enunciated in the *Wyler* case been in anywise modified. In other respects the law of that case and the general principles therein enunciated remain and stand inviolate. This will at once appear from the following statement of Mr. Justice Cardozo in the case of *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 77 L. Ed. 619 (1933), wherein he said on page 68 (U. S.) in referring to these tests as laid down in the *Wyler* case;

> "* * * Later decisions have made it clear that this test is no longer accepted as one of general validity. * * *"

In *N. & G. Taylor Company* v. *Anderson*, 275 U. S. 431, 72 L. Ed. 354 (1928), N. & G. Taylor Company as a partnership entered into a contract with the defendant dated November 1, 1916. On January 31, 1917, the partners organized a corporation under the same name. On March 7, 1918, suit was instituted against the defendant by the plaintiff in its corporate name. In May, 1924, and after the Statute of Limitations became operative, the plaintiff sought to amend the complaint by alleging the original contract between the partnership and the defendant; the acquisition of all assets including the contract by the partnership, etc. The amendment was allowed by the trial judge. Mr. Justice Butler held that the amended declaration substituted a new cause of action which cannot be deemed to relate back to the commencement of the original action. He relied upon and specifically referred to the case of *Union P. R. Co.* v. *Wyler*, 158 U. S. 285, 39 L. Ed. 983. The *Taylor* case was decided in 1928 and followed without question the general rule of law enunciated in the *Wyler* case which was decided in 1895.

The case of *United States* v. *Memphis Cotton Oil Company,* 288 U. S. 62, 77 L. Ed. 619 (1933), arose out of a suit to recover overpayments of income taxes. It raised the question as to whether a claim for a tax refund which has been seasonably filed, but which fails to state the grounds upon which the refund is demanded, may be amended by specifying the grounds at any time before the claim in its original form has been finally rejected, though it be after the time when a wholly new claim would be barred by limitation. Both the Government and the taxpayer invoked analogies suggested by pleadings in a law suit. Mr. Justice Cardozo referred to the general rule of law that an amendment of a pleading will take effect by relation and thus relieve against the bar of an intervening limitation if the identity of the cause of action is still substantially the same, "*but that the limitation will prevail if under the guise of an amendment there is the substitution of a new cause of action in place of another wholly different.*" (U. S., p. 67.) On page 69 (U. S.) he said further:

> "* * * Definitions and analogies borrowed from pleadings in a lawsuit will have their place and recognition, but in due subordination to the differences of end and aim. Viewing the problem thus, we must say whether a statement by the taxpayer of supporting facts and reasons is to be assimilated to a bill of particulars explanatory of a claim, or is something so essential that there can be no claim without it."

This Court affirmed the action of the lower court in allowing the amendment principally on the basis of administrative practice. The claim for the tax refund was filed with an administrative department and did not constitute a complaint or petition in a court of law.

In *Bemis Brothers Bag Co.* v. *United States*, 289 U. S. 28, 77 L. Ed. 1011 (1933), there was presented the question as to whether a claim for a refund of a tax had been presented in such form as to be subject to amendment after a wholly new claim would be barred by limitation. Here again we have a claim filed with an administrative department where the amendment merely clarified a valid claim seasonably filed, and did not, to borrow by analogy from pleadings in a law suit, create a new cause of action.

In all the foregoing cases, the suits were commenced or claims filed in time and before the Statute of Limitations had run so as to constitute a bar. It was only when the amendments were submitted that the Statute of Limitations was asserted and set up as a defense in bar.

III. The Decision of the Circuit Court is in Accord With the Decisions in Other Jurisdictions and With the Weight of Authority.

The case of *Buntin* v. *Chicago, R. I. & P. Ry. Co.*, 41 Fed. 744 (W. D. Mo., 1890), involved an action for damages resulting from the Railroad Company for overflowing the plaintiff's land. The original petition alleged the construction of an embankment, by reason of which the stream was diverted from its course. Nine years later an amendment was asked alleging that the construction of a bridge in a negligent manner had occasioned the overflow. The defendant demurred to the evidence on the ground of the statute of limitations with respect to the amendment. The demurrer was sustained on the ground that the amendment constituted a new cause of action which was barred by the Statute of Limitations. Judge Phillips said in part as follows (p. 749):

> "It is true that courts will allow amendments with liberality, in order to prevent the operation of the

> statute of limitations; but this indulgence cannot go to the extent, in order to avoid the statute, of permitting the plaintiff to substitute an entirely new ground of recovery, requiring entirely different evidence, so as to recover thereon, when he could not have done so if this amended petition were an original petition. Unquestionably, had this amended petition been filed, at the time it was, as an original petition, it would have been subject to demurrer, for the reason that the cause of action was barred by the statute of limitations."

And further (p. 750):

> "If the party introduces a new claim, it presents a new issue; and, as that is the first time the defendant has had an opportunity to interpose the plea of the bar, it must follow that his right cannot be taken away by the doctrine of relation, which goes back to the first act,—the filing of the original petition; otherwise, the party might perpetuate indefinitely a cause of action by suing for one thing, and, after the lapse of the statutory period of limitation, go back to the cause of action already barred, and revive it under the disguise of an amendment."

The case of *Birkes* v. *United Fruit Co.,* 48 F. (2d) 656 (D. C., S. D. N. Y. 1930), arose out of a motion to dismiss the second amended complaint on the ground that the cause of action therein alleged was barred by the statute of limitations. The first amended complaint charged that the crew of a vessel owned and operated by the defendant, wilfully and wantonly stabbed and assaulted plaintiff's intestate, the master. The second amended complaint alleged that the defendant failed to provide a seaworthy ship, in that among the crew there were men of vicious and criminal propensities to the imminent danger of the passengers and other members of the crew. Judge Bondy in sustaining the defense of the statute of limitations as to the second amended complaint said on page 657:

> "* * * The original complaint apparently was based on the right to recover for the willful misconduct of the crew in assaulting the master. Basing the amended complaint on unseaworthiness or on negligence in providing a crew among whom were men of felonious and criminal propensities, or in providing a ship that was improperly constructed, constitutes in legal effect a change in the cause of action. * * *"

See also *D'Allesandro* v. *United Marine Contracting Corp.,* 30 F. (2d) 718 (D. C. E. D. N. Y. 1928).

In *Chennault* v. *Stovall, et al.,* 160 So. 146 (1935), where is found a situation on all fours with the instant one, in that an action in tort was brought against the defendant, alleging a conspiracy to have occurred on February 1, 1932, suit was brought on January 16, 1934. Faced by a one year statute, which clearly eliminated his claim, plaintiff attempted to amend by changing the date of the last conspiracy to February, 1933, which tender was refused by the Court. The language is as follows:

> "The original petition, as it stood, filed in 1934 upon a tort alleged to have been committed in 1932, without any showing of delayed knowledge, was upon an action, on the face of the pleadings, forever barred by the prescription of one year, and therefore set forth no cause or right of action. In the amended petition it is alleged that, owing to a clerical error, the year 1932 was written instead of 1933. Granting this to be true, nevertheless the action on its face was barred.
>
> "In the case of National Park Bank *v.* Concordia Land & Timber Company, 159 La. 86, 105 So. 234, 240, the rule is stated as follows: 'The authorities are numerous to the effect that where the original bill of complaint, or petition, is brought before the prescriptive period has expired, or petition is amended after the expiration of the prescriptive period so as to state a cause of action, the amendment will relate back to the time of filing the original pleading and save the action from the bar of the Statute of Limitations, but that

it (the amendment) will not relate back to the time of the filing the original pleadings so as to save the action from the bar of the Statute of Limitations, where the original pleading fails to state any cause of action whatever.' "

The case of *Salyers* v. *United States*, 257 Fed. 255 (Eighth Circuit, 1919), was cited with approval by this Court in *N. & G. Taylor Company* v. *Anderson, supra.* The plaintiff had several causes of action and merely alleged one of them in his complaint, and the Court refused to allow an amendment after the statute had run as to the amended claim. The language follows (p. 259):

> "But we have here an instance where the plaintiff having two causes of action has stated but one of them in his original petition, although the amount demanded is large enough to cover both of his causes of action, and then seeks by amendment to set up facts vital to and constituting the second cause of action. An amendment setting up such new and second cause of action will not relate back to the date of the original petition, but will be governed by its own date, and if the bar of the Statute of Limitations or a bar to the right to maintain such new cause of action has intervened, the new cause of action must fail."

Pennsylvania, in the case of *Lane* v. *Sayre Water Co.*, 69 Atl. 1126 (1908), held that an amendment tendered after the statute had run should be refused and accordingly refused to correct a defective pleading by saying as follows:

> "It was held that a new cause of action cannot be introduced, or new parties brought in or new subject-matter be presented, or a fatal and material defect in the pleadings be corrected after the Statute of Limitations has become a bar. That there was a fatal and material defect in the original pleadings was decided by this Court when the case was here before, and we

> are not familiar with any authority that would permit an amendment which in effect introduces a new cause of action and cures a fatal and material defect in the pleadings after it is pointed out by this Court on appeal and when the Statute of Limitations has become a bar. There should be a finality to all litigation, and the judgment entered by this Court when the case was before us three years ago was final on all questions raised by the original pleadings. The Statute of Limitations is a bar to a recovery on any new suit subsequently brought, or, what amounts to the same thing, an attempt to institute a new action by amending the original pleadings."

In *Martin* v. *Pittsburgh Rys. Co.*, 227 Pa. 18, 75 Atl. 837 (1910), the accident occurred on January 21, 1904. The original statement of claim was filed on November 2, 1904. The negligence was that the car was running at an excessive rate of speed and that there was no headlight on the car, and that no bell was rung or gong sounded as the car approached the crossing; and that the decedent suffered injuries while attempting to cross a public street. On September 4, 1906, plaintiff sought to amend the statement of claim by alleging that the decedent, an intending passenger, signalled the car to stop which it did, and while in the act of boarding the car, and before he was securely on it, the car suddenly started and threw him to the ground and under the car. The Supreme Court on appeal held that the amendment should not have been allowed because the Statute of Limitations had become a bar. Mr. Justice Elkin in speaking for the Court said (Atl., p. 837):

> "* * * It is not, therefore, a case of adding to or amplifying the original statement within the rule recognized in some of our cases, but, on the contrary, a different theory is relied on, new grounds are set up, and other acts of negligence entirely different are alleged. * * *"

In *Gilmore* v. *City of Chicago,* 224 Ill. 490, 79 N. E. 596 (1906), plaintiff filed her complaint alleging that she sustained personal injuries by stepping into a hole in a sidewalk. She charged that the defendant had control of a certain public sidewalk on the north side of a certain public street called Thirty-Eighth Street at or near the intersection of Thirty-Eighth Street with Princeton Avenue, and between Princeton Avenue and Shields Avenue. She later amended the complaint by striking out the words "Princeton Avenue" wherever the same occurred in the complaint, and inserting in lieu thereof the words "Stewart Avenue." Defendant pleaded the Statute of Limitations to the complaint as amended, and this defense was sustained on the ground that a new cause of action was stated in the amended complaint.

In *Union Pacific R. Co.* v. *Sweet,* 78 Kan. 243, 96 Pac. 657 (1908), the original petition charged the railroad with setting out a fire on or adjacent to its right of way in the Town of Wakeeny. During the trial, the plaintiff sought to amend his petition by charging the railroad with setting out a fire at the time mentioned in the petition at a point about five miles from Wakeeny. The amendment was allowed after the defendant had pleaded the Statute of Limitations. This was held to be error since the new cause of action set forth in the amended petition was barred.

The case of *Andrews* v. *Marsden,* 122 Atl. 171 (1923 Penna.), arose out of an action to recover goods alleged to have been illegally seized under a distress warrant. The plaintiff originally alleged that the defendant "with force and arms" seized and carried away personal property of the plaintiff's. At the trial eight years later, the plaintiff attempted to amend to show that he was a tenant of the defendant's and that the levy was made under a landlord's warrant and that it was illegal. He also asked to amend the date of the wrongful distraint from March 5, 1912 to February 2,

1912. The Court refused both the amendments and entered a nonsuit from which the plaintiff appealed. Said the Court (p. 171):

> "The rule is well settled that after the Statute of Limitations has run plaintiff shall not be permitted by amendment to 'shift his ground of complaint, introduce a new cause of action, cure a fatal defect in the pleadings, change his cause from a common-law to a statutory proceeding, or deprive the defendant of any valuable right.'" *Card* v. *Stowers Pork Packing & Provision Co.,* 253 Pa. 575, 579, 98 Atl. 729.

And further (p. 172):

> "The evidence offered by the plaintiff was inadmissible under the pleadings, as it failed to sustain the cause of claim. A non-suit, accordingly, was properly entered. The offer to amend came too late, inasmuch as the proposed amendment set forth a new cause of action, barred by the Statute of Limitations."

The case of *Calhoun* v. *Washington Veneer Company,* 15 Pac. (2d) 943 (Wash. 1932), is very similar to the instant case on the facts. In this case, suit was started in September, 1931. The plaintiff worked in the glue room of the defendant company from April 20, 1926, until on or about the middle of May, 1928. This room was not ventilated in accordance with the statutes of the State. He worked from the middle of May, 1928, until November 17, 1928, in another room which was properly ventilated. On page 946 the Court said:

> "* * * Under the allegations * * * that Claude Calhoun worked for respondent in and about the glue room from on or about April 20, 1926, until on or about the middle of May, 1928, and from the middle of May, 1928, worked in another room, not alleged to have been improperly ventilated in violation of the Factory Act, until November 17, 1928, it is manifest that any injuries

> received from violation of the Factory Act by respondent, culminated and accrued about the middle of May, 1928. His action was not commenced until September, 1931, which was more than three years after the injuries had accrued under the Factory Act and would have been barred. * * *"

In this group of cases we also have the situation where the original suits were commenced in time and before the Statute of Limitations had run so as to constitute a bar. It was only when the amendments were submitted that the Statute of Limitations was asserted and set up as a defense in bar.

In the case of *Hester* v. *Mullin,* 12 S. E. 447 (N. C., 1890), an action was brought to recover damages for slander, and presented the following facts. A complaint was filed on January 20, 1889, alleging slanderous words uttered in April 1888. To this the defendant answered and pleaded the statute of limitations. Faced with a six months statute of limitations that barred his claim, plaintiff, at the trial on April 18, 1890, offered to amend, which was granted. He then filed an amended complaint setting up a cause of action for *other words* uttered by the defendant on another occasion, to wit: on September 14, 1888. The defendant filed his answer to the complaint as thus amended and set up the statute of limitations. The trial court held that upon the amended complaint the plea of the statute should be sustained. Upon a non-suit being entered in favor of the defendant, the plaintiff appealed. The Supreme Court affirmed his action, stating as follows (p. 447):

> "Amendments in this respect must be such, and only such, as are necessary to promote the completion of the action begun. In the present case the action begun, as set out in the first complaint, was for words spoken in April, 1888. The amended complaint sets out a new and distinct cause of action for other words spoken in Sep-

> tember, 1888, and, as to the latter, new and distinct cause of action, the amended complaint must be treated as the beginning of the action. Ely *v.* Early, 94 N. C. I; State *v.* Turner, *supra;* Robbins *v.* Harris, 96 N. C. 557, 2 S. E. Rep. 70; and the cases cited in them. There is no error.''

Here for the first time is presented a case where the Statute of Limitations was pleaded as a defense in bar to the original cause of action set forth in the original complaint and the defense was sustained as a good defense. An amendment was thereupon offered with respect to *other* words uttered at a date subsequent to the date referred to in the original complaint, and the amendment was denied by the trial judge and his ruling affirmed on appeal. This case presents the closest case available on the facts to the case at bar, and sustains unqualifiedly the judgment of the Circuit Court of Appeals in the instant case.

Summary of Argument.

It is respectfully urged as self-evident, that the gravamen or gist of the allegations of negligence with respect to ventilation under allegedly hazardous conditions in the Silicate Department is a different cause of action from that of similar conditions in the Phosphate Department, located, as it was, in a building at least five hundred feet away from the Silicate Department. The exposure was different; the plaintiff's employment was different, and was with liquids; the ventilation was different, it was in a different building, and with the majority of the work performed out-of-doors. Certainly had the transfer of the plaintiff on November 1, 1932, been to a plant in another State, there could be no identity of ''gist''; yet, this is not a hypothesis more extreme under the circumstances. When the limits of the negligence, as alleged, are reached, it is submitted that it makes no difference how far or how near the plaintiff may be—if he is in fact removed from the effects of that negligence as alleged. The injury here is alleged as a result of certain conditions; the specific acts of negligence or omissions amounting to negligence are perhaps the most important factors in the complaint and it is submitted that an amendment, allowing proof of an entirely different exposure, should not be allowed.

It is respectfully urged that the fact that the statute had run on the exposure in the Silicate Department must be taken to be established, both as a matter of local law and general authority.

Discussion of Petitioner's Brief With Respect to the Statute of Limitations (Point A, Petitioner's Brief, pp. 10-19).

Petitioner seeks to contend that the amendment to the complaint so as to include the Phosphate Department constituted an entirely immaterial addition to the Complaint, and further that the original complaint was entirely adequate to include the Phosphate Department without any amendment whatsoever. The argument of the petitioner to sustain these inconsistent contentions is most labored and illogical, and overlooks the pertinent facts that the Complaint when prepared by plaintiff's counsel was not intended in act and in law to relate to or include any department other than the Silicate Department (R. 128), and that when plaintiff's counsel and his architect-expert made a physical inspection at respondent's plant on May 11, 1936 (R. 695) they inspected only the Silicate Department. In this connection it will be recalled that suit herein was commenced on October 1, 1935 (R. 787), and the trial of this cause was commenced on June 9, 1936 (R. 89).

An examination of the original Complaint establishes that the plaintiff attempted thereby to allege and the Complaint did in fact allege only the following facts (R. 788); That plaintiff was employed at the defendant's plant until

November 1933; that during some part of the time (the exact time is not fixed in the Complaint) he was employed as a furnace operator in the Silicate Department, and that during the course of his employment *in said Department* he came in contact with certain substances due to the negligence of the defendant which caused him to become incapacitated in November 1933. The complaint does not specifically allege continuous employment until November 1933 in the Silicate Department; it alleges only that he was employed at the defendants' plant until November, 1933, and that the defendant was guilty of the negligence as charged *only* while he was employed in the Silicate Department. The allegation in Paragraph 4 of the complaint that the plaintiff became incapacitated in November, 1933, does not directly or inferentially charge continuous negligence until November, 1933; it charges only that as a result of the defendant's alleged negligence "in and around the said department" (referring to the Silicate Department which is referred to specifically in paragraph 2 of the complaint) without mentioning the exact period of time employed in that department, he became incapacitated in November 1933. In this connection it will be recalled that defendant by its answer stated that plaintiff was not employed in the Silicate Department after November 1, 1932 (R. 793), and the cause went to trial on the issues as thus framed. As hereinbefore argued, to suggest that the complaint as framed includes the Phosphate Department as well as the Silicate Department is to suggest that the complaint includes every other one or more of the numerous departments of respondent's plant, and this where all of these departments involve different operations, different products, different buildings, and many other material facts and circumstances. The essential elements of negligence charged and sought to be proved as to the Silicate Department were entirely different in material respects from those sought to be proved as to the Phosphate Department.

Petitioner's brief suggests that defendant was not surprised or prejudiced by the proofs with respect to the Phosphate Department. Petitioner overlooks the fact that defendant by its original Answer filed to the original complaint pleaded the Statute of Limitations as to the original cause of action framed by the Complaint, and since that defense was definitely available and constituted an absolute bar, defendant had a vested legal right in a dismissal of the plaintiff's suit, and had also a vested legal right to have plaintiff's application to amend the complaint denied to the end that an action barred by the Statute of Limitations as of the date it was instituted may not be resurrected and brought to life by an amendment. This argument of petitioner is best answered by the language of Mr. Justice Parker speaking for the Court of Errors and Appeals of New Jersey in the case of *Limpert Brothers* v. *Stitt, supra.*

In the case of *New York Central & Hudson River Railroad* v. *Kinney,* cited on page 15 of petitioner's brief, wherein Mr. Justice Holmes made the general statement that "where a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it of specified conduct, the reasons for the Statute of Limitations do not exist" (U. S., p. 346), he made this statement only in connection with the facts which appeared in that case. The original complaint had in fact stated a cause of action under the Federal Employers' Liability Act as well as at common law and under the New York Statutes, so that the amendment alleging that the plaintiff and defendant were engaged in interstate commerce at the time of the accident added nothing to the complaint as it originally stood. The general statement of law is not therefore applicable to the facts in the case at bar.

The case of *Grayson* v. *Lynch* (page 16 of petitioner's brief), deals only with the question of variance. Mr. Justice Brown held in that case that the fact that the precise place of contracting the disease could not be established did not bar recovery because the description of the exact place where *roving* cattle were infected with disease was wholly immaterial. This situation was wholly unlike that appearing in the case at bar where were involved "a different act, different buildings, departments, conditions and dates of exposure," different operations, products and other different facts and circumstances upon which the Circuit Court relied (R. 820).

In the case of *Chicago City R. Co.* v. *McMeen,* 102 Ill. App. Ct. 318 (1902), cited and discussed in petitioner's brief, the cause of action set forth in the original complaint had not been barred when suit was commenced. The Statute of Limitations was asserted as a defense in bar only when the amendment was added. Here again the amendment did not deal with different acts, conditions, operations and other material factors, but dealt only with a car standing in the middle of a street other than the street referred to in the original complaint. The same specific acts were charged and established under both complaints.

The case of *Seaboard Air Line* v. *Renn,* is relied upon by petitioner in her brief on page 18. In that case the original complaint had alleged that the defendant had operated its line in Virginia, North Carolina and elsewhere, and had therefore alleged interstate commerce without using the specific words "interstate commerce." The amendment sought only to use these words, and the amendment was allowed. There was obviously no change under the circumstances.

Petitioner's Brief on This Review Proceeds Beyond the Scope of the Single and Sole Issue Relied Upon and Argued in her Petition for Writ of Certiorari, and Upon Which the Writ was Granted by This Honorable Court.

In the petitioner's petition for writ of certiorari and brief, she assigned four specifications of errors on the part of the Circuit Court of Appeals (Pages 4 and 5). Specification No. 1 alleged error on the part of the Court in refraining from reviewing the evidence as to the knowledge of the respondent. The Circuit Court had held that it was not necessary to review the evidence with respect to knowledge in view of its conclusion that a verdict should have been directed for the respondent because of the two-year Statute of Limitations (R. 821). It is most obvious that there was no need for the Circuit Court to review the several other legal and factual questions presented and argued since its decision on the question of the Statute of Limitations was dispositive of the whole case in so far as the judgment of the District Court was concerned. Specifications Nos. 2, 3 and 4 refer wholly and exclusively to the question of the Statute of Limitations. The Statute of Limitations constitutes the single issue presented and argued in the petition for writ of certiorari. It represents the sole issue which was discussed in respondent's brief in opposition to petition for writ of certiorari. It also represents the single issue upon which the writ was granted by this Honorable Court.

In petitioner's brief on this review she undertakes to discuss and argue all the legal and factual questions which were presented to and argued before the Circuit Court of Appeals upon the appeal from the District Court. This we understand to be contrary to the settled and uniform practice of this Honorable Court as declared in the following cases: *Alice State Bank* v. *Houston,* 247 U. S. 240, 62 L. Ed. 1096 (1918); *Zellerbach Paper Co.* v. *Helvering,* 293

U. S. 172, 79 L. Ed. 264 (1934); *Prudence Company, Inc.* v. *Fidelity & Deposit Company of Maryland*, 297 U. S. 198, 80 L. Ed. 581 (1936); and *Johnson* v. *Manhattan Railway Company*, 289 U. S. 479, 77 L. Ed. 1331 (1933). We understand from these cases that under the facts and circumstances presented in these proceedings on this review the only question for consideration is that stated in the petition for writ of certiorari, namely, the Statute of Limitations, and that the review by this Honorable Court will be limited accordingly.

We are, however, in the unfortunate position of not being able to determine at this point with complete definiteness to what extent, if any, this Honorable Court will hear argument upon and consider the issues, other than the Statute of Limitations, which were presented to and argued before the Circuit Court of Appeals. This represents a dilemma which has been created by the wholly gratuitous action of the petitioner in going beyond the scope of her petition for a writ of certiorari, and thereby acting in conflict with the settled and uniform practice of this Court. This situation having thus been created by petitioner and being one which respondent cannot in anywise control, respondent has no alternative except to discuss and argue the several other legal and factual grounds presented to and argued before the Circuit Court although not considered by that Court which, in addition to the ground of the Statute of Limitations upon which the judgment for the respondent was sustained by the Circuit Court, must result in the judgment of the District Court being sustained. In other words, the judgment of the District Court can readily be sustained on the ground of the Statute of Limitations upon which the Circuit Court affirmed the judgment, as well as upon the several other grounds urged in behalf of respondent in the District Court and in the Circuit Court.

That part of this brief appearing hereinbefore preceding this caption was prepared and completed before we were apprised of the fact that the petitioner was going to discuss the other legal grounds argued before but not considered by the Circuit Court. We have concluded to permit that part of this brief to remain in its original form for reasons of legal propriety and orderly procedure, having regard to the proceedings leading up to the granting of the writ of certiorari. The affirmance of the judgment of the District Court by this Honorable Court upon the ground of the Statute of Limitations as accepted by the Circuit Court will make wholly unnecessary a consideration of the other grounds hereinafter discussed. These other grounds are similarly adequate and conclusive to affirm the judgment of the District Court in favor of the respondent.

The discussion which follows can have any relevancy or purpose only upon the assumption that the trial judge was correct in allowing the complaint to be amended so as to include not only the Silicate Department, but the Phosphate Department as well, and that the Circuit Court fell into error in holding that the trial judge committed legal error in allowing the amendment by reason of the operation of the Statute of Limitations. The discussion must therefore take place in the light of the amended complaint, and not in the light of the original complaint.

SUPPLEMENTAL BRIEF.

Discussion of Amended Pleadings.

Paragraphs 1 and 2 of the amended complaint allege that plaintiff was employed as a furnace man, operator and general worker in the Silicate Department, Phosphate Department and Dorr Department of the defendant's plant in Grasselli, New Jersey in November, 1933, and for some time prior thereto (R. 803 and 804). Defendant by its answer admitted that plaintiff was employed as a furnace worker in its Silicate Department up to November 1, 1932, and that he was employed as a laborer in its Phosphate Department from November 1, 1932 until October 23, 1933 (R. 805).

Paragraph 3 of the amended complaint alleges generally that it was defendant's duty to use reasonable diligence to protect the plaintiff from unnecessary dangers or risks, and to provide plaintiff with a reasonably safe place to work (R. 804). Defendant answered this paragraph by denying that it violated any duty which it owed to plaintiff (R. 805).

Paragraph 4 of the amended complaint charged that the plaintiff "*during the course of his employment in and around the said department and/or departments* * * * came into close contact with metallic, mineral, gas and/or other injurious substances * * * and plaintiff was exposed to and forced to breathe in the said * * * substances." (Italics ours.) We again direct the attention of the Court to the uncertainty in pleading with respect to the exact department in which plaintiff contends he suffered his alleged injuries, and in this connection we also direct the Court's attention to the fact that plaintiff testified and insisted that he became sick in the Silicate Department and not in the Phosphate Department (R. 36). The allegations of this paragraph were denied in defendant's answer (R. 805).

Paragraph 6 alleged that "defendant had knowledge of the dangerous effect of the inhaling and breathing in of any of the said substances aforementioned * * *" (R. 804). This was denied in defendant's answer (R. 806).

The remaining allegations of the amended complaint are not of importance for the purposes of this discussion. They were denied by defendant (R. 804-806).

Defendant in its answer set up five separate defenses (R. 806-808). The first defense pleaded the Statute of Limitations and other legal questions arising therefrom in connection with the ruling of the trial judge allowing the complaint to be amended so as to include the Phosphate Department. The second defense presented the defense of assumption of risk. The third and fourth defenses raised the defense of the Statute of Limitations. The fifth defense dealt with the fellow servant rule.

Petitioner Does Not Contend and Cannot Contend that the Products to Which She Alleges Decedent was Subjected are Poisonous, Noxious or Inherently Dangerous.

In the complaint it is charged that the plaintiff had been subjected to "metallic, mineral, gas and/or other injurious substances" (R. 788 and 804). This constitutes a general allegation with respect to the products used, and together with the facts presently to be suggested establishes that the suit herein was instituted on a bare chance and without any idea or hope of ultimate success. The decedent testified that he took samples of products from the respondent's plant prior to his final leaving in November, 1933. These samples consisted of silica glass, silica F. Grade, phosphate of soda, soda ash and metasilicate (R. 36-40). They were delivered to decedent's attorney on October 4, 1935 (R. 39). This suit was instituted on October 1, 1935 (R. 787). In other words, this action was instituted on a chance on October 1, 1935, without decedent's attorney having any knowledge whatsoever of the products which decedent handled or were being used in the departments where he worked. This set of facts explains the general and incorrect designation both in the original and amended complaint of the products which it is charged caused the decedent's illness—"metallic, mineral, gas and/or other injurious substances." Decedent's case was predicated upon a theory advanced by Dr. Alexander Gettler, a toxicologist. The aforementioned samples were delivered by defendant's attorney to Dr. Gettler on October 4, 1935 (R. 247), and he gave his report thereon on May 6, 1936 (R. 248). The burden of petitioner's case is based upon the contention that soda ash (carbonate of soda) dust caused the illness of decedent. Dr. Gettler placed soda ash, phosphate of soda and metasilicate in the same category because they react the same (R. 241). He testified that soda ash when coming in contact with water hydrolizes and produces caustic soda which is a very strong corrosive substance—also known as sodium hydroxide (R. 241 and 246). Dr. Gettler's report to decedent's attorney, although not in evidence, was apparently to the same effect (R. 315 and 316). Dr. Gettler was recalled as a witness several days after his original testimony and in the face of other testimony of a chemical nature, including the testimony of an independent chemist selected by the Trial Judge, was constrained to change his testimony and conclusions. His new and final testimony was that soda ash (carbonate of soda) when mixed with water goes through a chemical process of ionization and forms a substance of mild causticity (R. 360). All of which caused the following comment of the Trial Judge (R. 576):

> "The Court: Well, as I understand it, Dr. Gettler's theory was this severe caustic, which collapsed on examination, that theory, and I won't permit the jury to consider it, and then your other theory seems to be that inorganic dust, irrespective of its alkaline qualities, has this effect."

The trial judge so charged the jury with respect to Dr. Gettler's testimony (R. 745).

Since soda ash, phosphate of soda, and metasilicate come under the same general chemical category, and since the brunt of the plaintiff's attack during the trial was and in petitioner's brief is directed to soda ash, we shall proceed to discuss this product and show that it is entirely harmless, and that it does not come within the category of poisonous, noxious or inherently dangerous substances.

The largest manufacturer of soda ash in the United States is the Solvay Process Company, which has one of its plants in Syracuse, New York (R. 314). Dr. Chaffe, who has been connected with that plant as medical director for 35 years, testified for the defendant (R. 308). This company manufactures alkalis,—its main products are carbonate, bicarbonate and caustic soda (R. 308). He testified that soda ash is not a caustic; it is carbonate of soda; that caustic soda or sodium hydroxid is a caustic (R. 314). He further testified—"I have never seen in hundreds of men working there since I have been there any caustic effect from the carbonate of soda. I have seen plenty from the caustic soda, sodium hydroxid, which is strongly caustic and will destroy skin" (R. 316).

Mr. Davis, a chemist of the respondent, testified that soda ash is commonly known as sodium carbonate and is an alkali; that sodium bicarbonate, soda ash and caustic soda are all general alkalis with varying caustic strengths (R. 325 and 326).

The trial judge selected Dr. Wiener of Newark as an independent chemist (R. 330). His testimony corroborated the testimony of Dr. Chaffe and Mr. Davis (R. 330-332). Dr. Wiener conducted an experiment in open court to test the caustic strength of soda ash and sodium hydroxide by applying it to the skin of his hands. The soda ash gave no irritating effect whatsoever, but the sodium hydroxid caused a small scar (R. 353 and 354).

The final testimony even of Dr. Gettler agreed with the foregoing (R. 356).

Statement of Questions Involved.

1. The trial court was correct in holding that there was not sufficient knowledge attributable to the defendant company that the commodities used at its plant were dangerous and of a nature likely to harm the plaintiff, and there was

no evidence to indicate that the defendant knew or should have known of any injuries likely to result from the exposure to soda ash.

2. The plaintiff failed to establish that his injuries were proximately caused by the exposure to soda ash in the defendant's plant, or that the exposure was the *causa causans* of his condition.

3. The plaintiff utterly failed to produce evidence that he endured any exposure to soda ash in the Phosphate Department where he last worked, and since his last exposure in the Silicate Department was more than 2 years prior to his instituting suit, his action was and is barred by the Statute of Limitations.

Statement of the Case.

Plaintiff, George Maty, testified that he was employed by the defendant in October, 1928 (R. 4), and worked in the Silicate Department. That he began to develop an itch in June or October of 1931, during the warm weather, after which he developed a carbuncle, in December, 1931 (R. 15 and 16). His skin was especially bad under his arms, exuding yellow water (R. 25), and he was sent to a skin specialist, Dr. Oleynick, at Elizabeth (R. 28). That in the winter of 1932 he was transferred to the Phosphate Department where he spent each week, 2 days outside and 3 days inside (R. 30). That his work inside dealt with liquids. That there was soda ash in the Phosphate Department, about 50 feet from where he was working (R. 32). That in October, 1933 (R. 32), he was advised by the company doctor that he had relaxed rings on his side (R. 34). That he then told the doctor that he was a sick man and had lost weight (R. 35). That he had the itch under his arms and in the region of the groin (R. 41). He further testified that he then took samples of the chemicals that he worked with in the Silicate Department, but that he did not take any samples from the Phosphate Department because he did not get sick in the Phosphate Department (R. 36 and 37). That he stopped working in November, 1933, because he felt sick from his itch, which prevented him from walking (R. 41.) That in April, 1934, (after he had left the employ of the defendant), his itch was getting worse around the groin and body and his hernia was getting weaker (R. 46 and 47). That he was treating himself for the itch and he was sick from that and from his rupture, and that he tried to get it out, going to the Alexian Brothers Hospital at Elizabeth, where he was operated on for the hernia (R. 47), remaining there 17 days, and that 3 days after his arrival home he began to cough up bad things and spit (R. 47 and 48). That in the Phosphate Department, the only dust came from the phosphate (R. 52). He further testified that he was transferred in April or May, 1933, to the Phosphate Department, which was about 500 feet away from the Silicate Department, in a different building (R. 61), and that he never returned to the Silicate Department thereafter. That he left the Silicate Department at the end of 1932, when he was transferred to the Phospate Department, at which time he worked 3 days outside and 2 days inside (R. 72 and 73). That it looked like May or April, 1932, that he went to the Phosphate Department (R. 72). That his work outside was done in the open about 50 feet from the river (R. 73). That on the inside, he worked with liquids (R. 73) and that this work continued until he left the job in November, 1933 (R. 75). That he got sick in the Silicate Department; he was a sick man in the Phosphate Department. That he got sick the first time in the Silicate Department, and in the Phosphate Department he had his wrist turned and received a hernia (R. 77). That when he worked in the Phosphate Department, in the Dorr plant, he ground the rock and mixed it with sulphuric acid, making a muddy deposit (R. 78). That there were enough windows in the Phosphate Department (R. 79). That in the bin there were no windows, but that he only worked there 4 or 5 times (R. 84). That the things he worked with in the Phosphate Department were phosphate rock mixed with sulphuric acid and water (R. 85), and that the soda ash was on the side but that was not his job (R. 86). That the breaking of the phosphate rock, which was his job, gave some dust but not so much (R. 87). That his work with the sulphuric mixture gave off only steam (R. 87).

The plaintiff produced as a witness, Paul Messaros, who worked at the Grasselli Chemical Company, in the Silicate Department, from February 26, 1931, until September 5, 1934, when he was transferred to the Phosphate Department (R. 161 and 162), and who testified that Maty only worked with him two or three weeks in the Phosphate Department (R. 160). Finally, upon questioning by the Court, he testified that he did not work with Maty in the Phosphate Department at all (R. 173). On motion of the defendant, all of this witness' testimony with respect to the Phosphate Department was stricken from the record (R. 171-173).

Joseph Laskoti, who worked in the Silicate Department from October 4, 1922, until February 4, 1929 (R. 183 and 184), testified that he worked both in the mix room (R. 186), and on the furnace, and that the only time he was absent from work was once in 1925, when he was sick with a rash (R. 195). That he was only with Mr. Maty for 2 months, during which time they were both employed in the Silicate Department (R. 187).

Tony Chuba, being called for the plaintiff, testified that he had been employed by the Grasselli Chemical Company off and on for 18 years (R. 196), and that the only complaint he ever had was a stomach ache (R. 202). That the only time he worked in the Phosphate Department was when he had been sent there from time to time for odd jobs, and that he was in the Silicate Department for the entire period of his employment, and during the period spent with the company by the plaintiff (R. 216).

John Andricik testified that he had worked in the Barium Products Department of the defendant's plant; that he had never worked in the Silicate Department. That for a period of 6 weeks, when the Barium Products Department had been closed, he worked in the Phosphate Department. That this was during the summer of 1933 (R. 222), and that while he worked there, he only saw Maty about two or three times (R. 223 and 224).

Dr. Stephen Steele, a physician from Linden, New Jersey, testified that he first saw the plaintiff in 1931, when he complained of headaches and dizziness, but no mention was made of a cough. He also treated him for 2 weeks in 1934, when he complained of a cough, expectoration and pain in the side (R. 227). He further testified that he had never seen a case like this, and that he never had a dust case (R. 229).

The plaintiff produced Dr. Alexander Gettler as his chief witness, who testified that he had analyzed the chemicals submitted to him by the plaintiff on October 4, 1935 (R. 247) (Note: After the suit was started), and that he gave his report thereon to counsel for the plaintiff on May 6, 1936 (R. 248). That he has had no experience with the inhalation of soda ash or phosphate dust in factories (R. 232), and that he has never had a case where material was inhaled (R. 235). That he never examined a man who had inhaled caustic powder (R. 235). He further stated that soda ash, trisodium phosphate and sodium silicate react about the same and that soda ash, when coming in contact with water, crystallizes and becomes caustic soda, which is a very strong corrosive substance. He added that when caustic soda came in contact with any tissue of the body, it produced 3 effects:

(1) Decomposed the proteins.

(2) Decomposed the fats.

(3) Dehydrates the tissue by drawing out the water, with the result that irritation, corrosion, swelling and edema set in (R. 241).

That these conditions are irritating to the lungs. That soda ash and phosphate of soda, coming in contact with the lung tissue, which is a wet substance, dissolves, hydrolyzes and produces caustic soda, also known as sodium hydroxide (R. 245 and 246). *That he has read practically all of the books on toxicology, but has never seen a case in the literature involving inhalation of soda ash* (R. 248 and 249). That the greatest effect of the dust particles is due to the change which occurs when they come in contact with moisture, *i.e.*, after they are hydrolized (R. 252 and 253). That soda ash would have the same effect if it got into the mouth, provided it remained there, and that the only reason it did not cause such trouble is because the saliva continues running and washes the tongue continually (R. 254).

Dr. Gettler was recalled as a witness by the plaintiff several days after his original testimony, and experiments were made in open court by Dr. Gettler and Mr. Davis, a chemist for the defendant company, as a result of which Dr. Gettler changed his testimony as follows:

He then testified that water changes and hydrolyzes sodium carbonate, *i.e.*, soda ash, to an alkaline substance, and this alkaline substance is ionized sodium hydroxide. The Court directed the witness' attention on several occasions to the change in the nature of his testimony in this important respect. The witness further stated that sodium hydroxide was more caustic than sodium carbonate, and that either was caustic only when moisture met it. That sodium hydroxide is more caustic than sodium carbonate, simply because there are more hydroxyl ions present and that it is the hydroxyl ions that cause the corrosion, and that sodium hydroxide was "very much more powerful because of the greater concentration," and that the less water added, the less ionization. That even bicarbonate of soda that is taken for the stomach gives hydroxyl ions in coming in contact with water, but it is a very weak alkaline. The doctor further admitted that he did not mention ionization in his original testimony, and that his theory was different from that which he had advocated previously and was then that any alkali mingled with water forms hydroxyl ions and that the number of these ions depended upon the kind of alkali and that the smallest number is in sodium bicarbonate, the next largest number is in sodium carbonate and the last and largest number is in sodium hydroxide (R. 335-348; 356-361).

The testimony of the doctor was entirely discredited by the Trial Judge who stated that he would not permit the jury to consider the same (R. 576) since Dr. Gettler had withdrawn his original theory, and the jury was so charged (R. 745).

The plaintiff also called Dr. Raphael Pomeranz, who testified that he diagnosed the case from the x-ray plates alone and without any physical examination or other tests as originally a lung abscess with a probable bronchiectasis (R. 259-262).

Dr. John E. Runnells was called by the plaintiff and testified that he examined the plaintiff on September 25, 1935, and that his examination revealed a pulmonary abscess. That he saw him before the trial and found him progressively worse (R. 267). That he has had no experience in cases of persons who had inhaled soda ash (R. 268), and that there are many known causes of pulmonary abscesses, and some unknown causes (R. 269). That he has read the medical journals but has never recalled seeing a case of the effect of caustic soda on the lungs (R. 270 and 276). That in his opinion, if you grant that the plaintiff did inhale soda ash and that it produced the caustic effect testified to by the chemist (R. 269), and if this irritation was caused by caustic soda, that that might be the producing cause of the abscess, and that anything that would produce a chronic irritation of the lung, might produce an abscess (R. 271). He further testified that he could find from the x-rays no suggestion that dust of any sort was the cause of the lung condition of the plaintiff (R. 277), and that in the absence of any irritating effect upon the mouth and the nostrils and the closed respiratory organs, he would be doubtful about the inhalation of dust having had any effect upon the lungs, as it would be necessary for such dust, being inhaled, to affect the nostrils and mouth (R. 278-280). *The testimony of Dr. Runnells that was predicated upon his hypothesis of caustic soda or sodium hydroxide, was stricken from the record on the ground that the testimony of Dr. Gettler to this effect had been withdrawn (R. 371). Dr. Runnells' testimony disclosed that he based all of his answers upon that testimony and he stated that "if soda ash produced the corrosive effect that has been testified, then he would have had a long continued chronic inflammatory condition of his bronchial mucous membrane and his lungs" (R. 269).* Dr. Runnells had testified after Dr. Gettler had given his first testimony and before he had been recalled and changed the effect of his original testimony.

Dr. Runnells further testified that an irritating substance inhaled into the lungs would enter them bilaterally, unless there was an obstruction on either side and the irritating effects would be disclosed on both sides (R. 654 and 655). That a person inhaling any irritating substance which affected his lungs would first notice a condition in his nostrils and organs entering into the lungs (R. 660-663) and that difficulty in light penetration would be found on both sides of x-ray plates where a substance of irritating nature had been sufficiently inhaled (R. 655). He also testified that he did not attend Mr. Maty, but merely examined him (R. 649 and 653), and that the left lung was clear, with the right showing evidence of a lung abscess, and that this established the fact that the left lung contained no obstruction (R. 656). That the only condition he found in the left lung was the natural fibrosis that everyone has, and that the amount of fibrosis in the left lung in the x-rays of the plaintiff was of no consequence (R. 658).

Dr. I. Edward Gluckman was also called as an expert on behalf of the plaintiff. He testified that he made one examination of the plaintiff on October 23, 1935, and that he diagnosed an abscess of the lung (R. 283). He further testified that he had no experience with soda ash and phosphate of soda (R. 286). That some people are more susceptible to irritants than others (R. 287), and that he had never seen in any medical journal or book or anywhere else, a case in which an abscess of the lung occurred from the inhalation of the phosphate soda dust or soda ash dust, and that this was the first time he had ever seen soda ash or phosphate of soda chemically analyzed and a report given by a man like Dr. Gettler (R. 288). *That the plaintiff may have been hypersensitive* and, therefore, he would not necessarily alter his conclusion that the abscess was due to an inhaled irritant, because of the fact that no one alse having been subject to the dust sustained the same injury (R. 291). He testified further that it is impossible to state positively what caused a lung abscess, because of the fact that if you have some sort of an irritant, you have to conclude that that irritant had something to do with the irritation of the lung, and that you cannot tell positively that it was soda ash or phosphate of soda or anything else, it being impossible to pin it down specifically to one particular irritant, unless that irritant was present and then they have to suppose that it had something to do with it (R. 295).

The testimony of Dr. Gluckman that was predicated upon his hypothesis of caustic soda or sodium hydroxide as an irritant was stricken from the record on the ground that the testimony of Dr. Gettler had been withdrawn (R. 371). Dr. Gluckman had testified after Dr. Gettler had given his first testimony and before he had been recalled and changed the effect of his original testimony.

The plaintiff rested after the testimony of Dr. Gluckman. Defendant moved to strike out certain testimony, and also moved for a nonsuit which motion was denied and an exception taken (R. 301-307). The defense then proceeded with its case.

Defendant produced Dr. Ralph W. Chaffe, who testified that he has been for 35 years the plant physician for the Solvay Process Company, a company manufacturing alkalies, carbonate, bicarbonate, caustic soda and soda ash since 1882. That as such, he has had charge of both the occupational illnesses and non-occupational illnesses (R. 307-312). That the soda ash department maintains between 200 and 300 men daily and that in the caustic soda department about 250 men are employed. That the men are in contact with dust continually and all have dust on their clothing (R. 312 and 313). That in the caustic soda department very fine particles of caustic dust alight on the skin and are called mosquitos, because of a slight biting, but there is none of that in the carbonate of soda or the soda ash department (R. 313). *That in his 35 years of experience at the Solvay plant, he has never found or heard of a case of lung injury resulting from the inhalation of soda ash dust* (R. 313). That soda ash is not caustic but that the caustic soda or sodium hydroxide is a caustic (R. 314), *and that the only irritation that he had ever seen from soda ash* *was that around the wrists where the arms were rubbed by the sleeves, which was caused the same as any other dust would cause an irritation, i. e., a mechanical irritation. This occurred only during the summer when the men are warm,* and that they had never considered it a chemical irritation (R. 315). That he had only had one case of dermatitis that had ever been said to be due to soda ash and that this is the only case of external injury he ever heard of (R. 315). He testified further that he had never heard of carbonate soda being called a caustic and had never found it corrosive or productive of abscesses. That he had never seen, in hundreds of men working there since he had been there, any caustic effect from the carbonate of soda, but that he had seen plenty from the caustic soda, which is strongly caustic and will destroy skin (R. 316). That the only place respirators are used by the men is in the store room where long banks of soda ash are stored that are sometimes pulled down with long-handled poles in amounts varying from 10 to 15 tons at a time and that this is only to prevent the men from filling up their nasal passages, but that in the ordinary manufacturing and packing of soda ash, no respirators are worn. *That soda ash gives off only the same type of irritant that any form of dust causes* (R. 317 and 318). That they have two men working there who were there when he came 35 years ago and that the labor turnover is very low in that department. He further testified that he had never heard of any respiratory injuries resulting from the inhalation of soda ash (R. 319).

Charles T. Davis, called by the defendant, testified that he was a chemical engineer, a graduate of Harvard University and that he was employed by the defendant company. He stated that no amount of water added to soda ash will produce a chemical change, and that Dr. Gettler's statement to that effect was inaccurate (R. 326). He testified further that he was foreman in the Silicate Department, commencing August, 1928, that he had an office in that building; that he hired Mr. Maty on December 5, 1928, employing him as a furnace man (R. 399), and that the workings of the Silicate Department were as follows (R. 400-413):

That soda ash was contained in a separate silo and was transported by means of a pneumatic conveying system to a scale tank where it was weighed and from there it went to the furnace room by means of a steel overhead conveyor, confined in a welded steel housing and that from there it was charged into the furnace through a continuous screw conveyor. That the screws are encased in solid pipe and that the entire system from the mix room to the screw conveyor itself is sealed, and that there was no leakage. That as a factory, the Silicate Department is very clean and without dust, and that the question of presence of dust is entirely comparative, and that considering this to be a manufacturing operation, there was no dust there (R. 558 and 559). That the plaintiff was under his supervision during his entire employment with the company (R. 581 and 582). That there could not be a tremendous amount of loss from dust because of the fact that the soda ash is an expensive commodity and that the amount entering into the product and the amount analyzed as being existent in the completed product were compared in order to ascertain the loss by waste (R. 582 and 583). Dust conditions were never like smoke and were never heavy and dust from the mix room was negligible (R. 584), and there were no holes in the overhead conveyor (R. 586).

Mr. Davis further testified that the plaintiff's duties caused him to spend his time approximately as follows: 10% to 15% on the charging platform, 20% observing the burners on the sides, 25% on the discharge end and 5 to 10% at the auto-clave (R. 587). He also testified that the ventilation of the entire department was adequate and that no complaint was ever made by the plaintiff or any other employee concerning dust, but that he had heard the plaintiff complain about the itch (R. 590), and that he had never seen any itch on Maty's exposed parts. That no complaint was ever made of a cough, nor did he ever hear Maty cough (R. 591), but that Maty requested to be transferred to another department, because his itch bothered him more when he worked around heat, and that a favorite topic of conversation with him was his itch (R. 591 and 592). That on November 1, 1932, he, Maty, was transferred to an outside job in the Phosphate Department where it would be cooler. The witness further testified that the plaintiff never worked with soda ash while in this department, as that was in the other side of the building, and was used solely for the neutralization of phosphoric acid into disodium phosphate. That Maty had no contact with soda ash in this building (R. 592 and 593). That for 4 days of each week the plaintiff was assigned to a job outside the building approximately 300 feet from the waterfront and that he worked on rocks, which he weighed and dumped, and that there was no soda ash there (R. 594 and 596). He further stated that when the plaintiff worked on the outside, his job did not take him on the inside of the building. That following the 4 days he worked outside, on the 5th day he would work as a shift breaker on the Abbey Mills and around the tanks (R. 594-596) and that he was not allowed to work in the bins or anywhere around heat, in order to keep him as cool as possible. That all the materials that he worked with inside were liquid in nature, except the phosphate rock (R. 602), and that there was no dust (R. 605). The he did not at any time work with soda ash or meta silicate in this department (R. 603), and that dust conditions were extremely good. That there was plenty of ventilation (R. 605), and that no dust arose from the tanks (R. 609), and that during his entire period with the company, since 1924 (R. 605), he has never heard of anyone suffering injuries to the respiratory system while working in either the Silicate or Phosphate Departments (R. 605).

Joseph R. Heard, called by the defendant company, testified that he was a chemist in the employ of the Solvay Process Company, in Syracuse, New York, and had been connected with them since 1924 (R. 349). That they were manufacturers of soda ash, caustic soda and other products, and that he had been in charge of the chemical phase of all products manufactured at this plant (R. 350), and that the department for the manufacturing of soda ash was the largest department in the plant (R. 373). That the dust at the Solvay plant was and is so heavy in the soda ash department that it was plainly visible in the air and had accumulated on the walls, beams, floors, etc., and that the men work 8 hours continually and do not wear respirators (R. 377 and 378). That he had inspected the Silicate Department of the defendant's plant (R. 375) and that his testimony was that there was more dust at the Solvay plant than at the plant of the defendant (R. 377). That the dust was never considered dangerous and he was sure that respirators were never worn (R. 381) and that the only place involving soda ash where respirators were worn was in the store rooms where great mounds 20 or 30 feet high were piled, and that it might happen that a man might dislodge so much soda ash that he would be buried alive and the respirators were used simply to prevent him from suffocating until help could reach him (R. 380 and 381). That in the furnace room they often have sudden discharges of soda ash (R. 383 and 384), and that he knew of no case of a lung injury or any other form of pulmonary disease arising by reason of the manufacture of soda ash (R. 382).

Dr. William Wiener, of Newark, New Jersey, was called by the Trial Judge as an independent and impartial witness on his own volition. He was considered by the Court as the leading chemist in Newark, and a very distinguished expert (R. 330). Dr. Wiener testified that there is no chemical change when sodium carbonate is added to water, and this is true regardless of the quantity of sodium carbonate and of the water. Sodium hydroxide, i. e., caustic soda, is not and cannot be formed by the combination of water and sodium carbonate (R. 331 and 332). That even assuming the facts in the chemical reaction suggested by Dr. Gettler, soda ash, when it comes in contact with water is an irritant or alkaline substance "of just a minor nature, minor irritating character" (R. 340). That sodium hydroxide is the more destructive combination, much more destructive than soda ash (R. 340). In order to test the irritating nature of the caustic qualities of soda ash as compared with sodium hydroxide, Dr. Wiener moistened the top of each hand with water. On his left hand he then rubbed some sodium hydroxide, and on his right hand be rubbed sodium carbonate (R. 353 and 354). After a short while, a small scar appeared on the left hand where he had rubbed the sodium hydroxide, but no indication whatsoever appeared on the other hand where he had rubbed sodium carbonate. The soda ash gave no irritating effect, but the sodium hydroxide was still burning and to counteract it, Dr. Wiener testified he would place acid thereon (R. 368). That he would conduct tests and give the Court the benefit of his testimony with respect to the relative amount of hydroxylions in the two substances, *i. e.,* soda ash and sodium hydroxide (R. 369). That in his opinion, the ratio, after such tests and computations, was one to four, *i. e.,* that the sodium hydroxide had four times the caustic strength of sodium carbonate (R. 463).

F. A. Abbot, called on behalf of the defendant, testified that he was a State Inspector of the Labor Department of the State of New Jersey (R. 385), and that he had been an inspector for 9 years and that the plant of the defendant company was in his district for several years (R. 386).

That his duties were to make an inspection with respect to ventilation, dust hazards, fire preventions, etc. (R. 388). That his inspections of the defendant company's plant, including the Silicate and Phosphate Departments, were satisfactory and that he found the plant exceptionally clean with respect to dust conditions. That he found no cause to report any violation for ventilation conditions (R. 389 and 390).

Bessie Hall, called for the defendant, testified that she had been a graduate nurse for 20 years, and in 1928 was employed by the Grasselli Chemical Company, and that at that time, she personally took the weight of Maty at a physical examination and found it to be 135 pounds (R. 414-416).

Dr. H. Kessler, called by the defendant, testified that he was a physician engaged in orthopedic and industrial surgery and that he saw the plaintiff on March 12, 1934, with respect to a wrist injury (R. 416). That at that time the plaintiff volunteered the information that his two complaints were the skin itch and the disability to his wrist (R. 417 and 418), and that he made no mention of a cough or a lung condition.

Dr. H. A. Tarrant, called by the defendant, testified that he was a practising physician and was employed at the defendant's plant between 1932 and 1934 (R. 418 and 419). That he made a complete physical examination of the plaintiff on October 30, 1933 (R. 419). That at that time his weight was 130¾ pounds (R. 419) and that upon examination of his chest he found no rales, and that his only complaints were insomnia and itching, but that he said nothing about having had a cough or losing weight. That his chest expansion was 3 inches and that his skin condition was a fungus infection similar to athlete's foot (R. 420-422). During his whole treatment of Maty nothing was ever said about any cough or pains in the chest (R. 423). He further stated that he had had no x-rays taken because the plaintiff had no condition that would indicate the need for an x-ray (R. 431 and 432).

Dr. James A. Novello, called by the defendant, testified that he was an intern at the St. Alexian Brothers Hospital and that he made a physical examination of the plaintiff in June, 1934, taking his history at that time. That this was done as a preliminary measure towards conducting a hernia operation (R. 434). That his general appearance was that of a well developed man and that his lungs were clear and resonant throughout, with no rales, and that he gave no history with respect to a cough, chest pains or any lung condition whatsoever, or of any loss of weight (R. 434-436).

Dr. Wm. H. McCallion, called for the defendant, continued the testimony as follows:

That he read Dr. Novello's, the previous witness', report of the physical examination of Maty before operating on him and that as a result he as a staff surgeon of the hospital performed a herniotomy on the plaintiff at the Alexian Brothers Hospital in June, 1934, administering a general anæthesia, consisting of nitrous oxide and ether. That there was nothing objective with respect to the plaintiff's condition while he was in the hospital other than the hernia, and that there was nothing noticeable about his chest, and that nothing was noticeable with respect to coughs. That he was discharged as being in good health and properly cured, on June 26, 1934 (R. 441-445). That if the history of the plaintiff had disclosed a cough, he would not have operated upon him (R. 450). That he made a physical examination of Maty on March 6, 1936 (R. 446), and that as a result of the study of the x-rays and the physical examination, he made a diagnosis of bronchiectasis, which is an inflammation of the bronchii of the lungs with the forming of pus or fluid (R. 446-448), and that he had never heard of a lung condition arising by reason of soda ash or phosphate dust (R. 461).

Dr. Simeon Oleynick, a skin specialist, testified on behalf of the defendant, that he first saw Maty in March, 1933, at which time his skin was covered with a rash, with the exception of the exposed parts. The arm pits were badly inflamed, but his face and hands were not affected. That he made skin tests with the identical chemicals Maty worked with and which Maty himself brought him, and that these tests were negative and indicated that there was no reaction on the part of the plaintiff to them. That this treatment and test period took place between March 17 and 29, 1933, and that he treated him locally until April 28, 1933. That on November 3, 1933, he saw him again, at which time he examined him around the armpits, genitals and other areas which were exposed to friction and perspiration. That his tests made in November, 1933, indicated that the plaintiff had a pronounced reaction to yeast fungi or ringworm, for which he subsequently treated Maty, and that his final diagnosis was that of a superficial ringworm infection. That he was impressed by the fact that there was no eczema on his face and that this was unusual, because the first place a person working in a chemical factory would be affected would be on the face and hands, and that the absence of irritation here led him to watch the plaintiff carefully for a ringworm infection (R. 464-468, and 475).

Dr. Virgil S. Pollak, called by the defendant, testified he was a lung specialist since 1906, and was the medical director of the Hudson County Tuberculosis Sanatorium and consultant in diseases of the chest in several hospitals (R. 478). That he made a physical examination of the plaintiff in March, 1936 (R. 479), and based upon his physical examination and a study of the x-rays, he diagnosed the plaintiff's lung condition as a bronchiectasis and pneumonitis, which is an inflammation subsequent to bronchiectasis and that bronchiectasis is a dilatation and inflammation of the bronchial tubes (R. 480-482). This condition is caused by many things, as for instance, an inflammation from previous diseases such as measles, pneumonia and infarcts. That a pulmonary abscess is a gathering of pus in a definite and limited area. That he felt that it was not an abscess because four or five times attempts have been made to drain or evacuate the abscess and have failed. The bronchiectasis usually takes place in the bases of the lungs. In Maty's case it existed in the right lower lobe (R. 482-490). That the witness believed that the plaintiff, being under a general anesthetic for a hernia operation, swallowed some infected material which entered his bronchial tube, causing an obstruction and bringing about a bronchiectasis (R. 491 and 492). The doctor further testified that his experience was very wide in cases of pneumonoconiosis and that dust would have to be inhaled bilaterally, *i. e.*, on both sides of the lungs at the same time, and if dust would be so inhaled, it would be visible in the x-rays, in a bilateral view. That the plaintiff's x-rays gave no evidence of any dust condition and that dust would necessarily be inhaled in both lungs. He further testified that if dust of a corrosive nature is inhaled, it would necessarily cause a condition in the nostrils and mouth and give an immediate reaction. A man subject to it would be forced to expectorate and, accordingly, it would not get into the lungs at all. He could not conjecture any corrosive dust getting into the lungs. If such a commodity were inhaled or swallowed, any man would be sick and would have vomiting and other distressing symptoms (R. 493-497). The doctor further testified that he had never heard of and there is no case on record of a person sustaining a lung injury from the inhalation of soda ash, phosphate of soda or metasilicate, and that he had tried to get such literature, but found no cases (R. 498). That if an average individual inhaled a corrosive dust, he would respond immediately by being taken sick and vomiting, and that such symptoms would develop immediately, and that dust would necessarily get into the mouth and be swallowed, since the mouth is the upper part of the respiratory tract (R. 499-501). It might be possible to inhale inorganic dust, which has an irritating quality, but not one which is of a caustic or corrosive nature (R. 508). The doctor further testified that he had never heard of bronchiectasis being produced by prolonged exposure to inorganic dust (R. 510). If the dust is caustic, it manifests itself immediately upon the person who inhales it, but if not caustic, it can be inhaled over a long period of time (R. 512).

Dr. James Fine, a physician called by the defendant, testified that he was a specialist in diseases of the chest since 1910; was director of the Department of Tuberculosis in the Newark Board of Health; consultant in tuberculosis at various hospitals; and has had a wide experience in cases involving inhalation of dust and gases (R. 520 and 521). During his testimony, a stipulation was made on the record by the court, that plaintiff did not claim any condition of fibrosis, and that the x-rays showed no such condition) (R. 519). He testified that he had examined the x-ray plates of Maty and that no pathology was found on the left side, but there were conditions noticeable on the right (R. 520). That when an individual inhaled a corrosive dust, the entire mucous membrane from the mouth to the bronchii becomes inflamed, and the most severe irritation would occur in the upper respiratory tract. The bronchioles and the air vesicles of the lung would be the last affected, and that very little, unless there was a massive introduction of irritating substances that would immediately knock out the patient. That if a person inhaled an irritating substance which did lung damage, he would first have the inflammation and then fibrosis. It would have to show in the x-rays. It would be symmetrical on both sides and you would find it on the right side as well as the left, because the bronchii are divided in 2 equal portions. They go to the bases of both lungs in the same number of bronchioles and bronchii. That upon inhalation there would necessarily be equal inhalation into both lungs, unless there was an obstruction on one side, in which event, there would have to be pathology on that side. Assuming a normal lung in the sense of being free from obstruction, the dust is inhaled equally on both sides, and if the dust which is inhaled is irritative, there must be evidence thereof in the x-rays, because the infiltration causes connective tissue and further causes the lung to lose its elasticity, which condition must appear in the x-rays (R. 521-523). Fibrosis is the result and is a hardened, non-active material thrown out in the lung. He was unable to find any in the x-rays of Maty. The absence of fibrosis in the x-rays indicates that no damage was done to Maty's lung from the alleged inhalation of dust over a long period of time (R. 523). Dr. Fine did not examine the plaintiff and stated that it was impossible to tell from the x-rays whether Maty had a bronchiectasis or a lung abscess. In his opinion, it was impossible to get a bronchiectasis or a lung abscess from inhalation of dust, and it has never been found in the medical records. The foul smelling odor of the man's breath might indicate either a lung abscess, a bronchiectasis or gangrene of the lung, and his exact lung condition cannot be diagnosed from x-rays; it can only be decided from special tests. The x-rays show that there is pathology or damage done to the lung, and it is impossible and improbable that the inhalation of inorganic dust of an irritating nature could cause any bronchiectasis or abscess or gangrene of the lung.

That the gradual inhalation of dust causes a fibrosis, and where there is a fibrosis there can be no infection. Such infection can only come from massive and acute inflammation such as that which might come from an explosion, which would come within 20 minutes, like a burn, but it could never come from the gradual inhalation of dust. When doctors speak of foreign bodies getting into the lung, causing an abscess, they do not mean particles of dust that have been inhaled, but they mean a large substance, such as a tooth or a nail. Particles of the dust do not come within the category of foreign substances. A corrosive or irritating dust would first infect the conjunctiva of the eye, which is the most sensitive part of the human anatomy, and thence the mucous membrane tract, down below to the bronchii and bronchioles and air vesicles. A constant cough could not cause a bronchiectasis, but is a part of and an incident to the same disease (R. 524-531). That no doctor would dare to give an ether anesthetic unless he found the lung absolutely normal (R. 533) and the plaintiff was operated on with such an anesthetic, having no bad effects from the ether at all. In his opinion, if the ether anesthetic would have done any harm, he would have had it within 24 hours. In the doctor's opinion, he recovered from the operation, went home, walked around and 3 days later shot an embolus in his lung, which is a substance which comes from the seat of an operation or from anywhere into the circulatory system—fat or catgut from the operation—or it may be tissue or anything which is carried by the venous system into the lung, obstructing that part where the bronchiectasis now exists, cutting off the entire blood supply, causing it either to become gangrenous or causing pneumonia. In his opinion, this was the cause of this man's condition, because the doctor is impressed with the fact that the patient walked around after the operation, had a normal chest expansion, that his chest was absolutely regular, because when he was operated on, the ether did not affect him, but suddenly he was taken with a coughing spell and that, in the doctor's opinion, shows that he shot an embolus, which caused an inflammation of the lung, which means the blood supply was cut off, infecting the entire spot where the blood supply had been cut off. This is a common result of an operation and, in his opinion, if the patient had been given ether and had been subject to a bronchiectasis at that time, he would have developed pneumonia and may not have survived the operation, and this same answer was true if he had any pathology in his chest. It would have a destructive effect upon the chest and would have resulted within 24 hours. That in his opinion, the man's chest was normal before the operation. That there is absolutely no relation between silicosis and the condition alleged in this case, since silicosis is not of a corrosive nature. That, in his opinion, there is no relation whatsoever between the present condition of the plaintiff, whether it be a bronchiectasis or an abscess, and his working conditions, but was rather a condition that might have occurred to a gardener or a housewife. That there is a definite distinction between an ether embolus and an embolism after an operation. An embolus from the ether would occur within 24 hours to 72 hours (R. 533-536). That the fact that there was an absence of fibrosis in the lungs showed emphatically that no harm had been done to this man through the inhalation of caustic materials, since he worked for 5 years in the plant (R. 544).

Dr. Henry Field Smyth, Jr., who was called on behalf of the defendant, testified that he was an instructor in Sanitary Chemistry at the University of Pennsylvania, having received his degree of Bachelor of Science in Chemical Engineering in 1925, and his degree of Dr. of Philosophy in Hygiene in 1934. That his duties consisted of making dust and vapor tests in industrial shops; that on May 16, 1936, he personally made dust tests at the plant of the defendant company, and that his tests were made with respect to soluble alkali dust, in both the Silicate Department and the Phosphate Department, all of which tests were made in the presence of Charles Davis, a former witness (R. 565 and 566, 549). The tests were made at the peak manufacturing operations in these two buildings (R. 549-557). Tests were also conducted in the mix room, which were made at the time that soda ash was being introduced into the drums, which is the worst condition possible in that room. The results indicated that in the mixing room on a test using 20 minutes of time, soluble alkali dust represented 5.15 milligrams per cubic meter of air. That on the feeding platform of No. 3 furnace, on a test utilizing 30 minutes of elapsed time, the soda ash dust was .014 milligrams per cubic meter of air. That while a buggy of finished glass was being unloaded in the Silicate Department, a test utilizing 5 minutes of time, indicated that the soluble alkali dust was present to the extent of 7½ milligrams per cubic meter of air. This actual dumping required only 5 seconds and the dust cloud was no longer visible at the end. That at the Oliver filter presses in the Phosphate Department, on a test utilizing 20 minutes of elapsed time, the soluble dust was .016 milligrams per cubic meter of air. That at the Abbey Mill of the Phosphate Department, tests for soluble alkali dust utilizing 30 minutes of elapsed time, showed the presence of .194 milligrams per cubic meter of air (R. 566-569). *The witness further testified that there is nothing in the literature to indicate the safe concentration for soluble alkali dusts on the human body, but that the nearest approach that could be found in the literature was for ammonia vapor, which has the identical effect on the body, having the same caustic effect* (R. 568).

Dr. Henry F. Smyth, called for the defendant, testified that he was a physician and toxicologist, had studied in Vienna and had taken a Public Health degree in 1921. He has been teaching hygiene, public health, industrial hygiene and has conducted a research laboratory in connection with his son, the previous witness. That he has investigated health problems for the Industrial Boards for the States of New Jersey and Pennsylvania, as well as for the National Safety Council. That during the war he enjoyed a commission as Chief Assistant Surgeon, controlling industrial health conditions in the munitions industries in this part of the country (R. 570 and 571). *That there were no figures for the safe concentration of soluble alkali dust, and that the nearest approach is that for continued exposure to ammonia fumes. That ammonia contains approximately the same degree of alkalinity and irritation that the metasilicate dust possessed,* and that the safe concentration for prolonged exposure to the ammonia fumes is somewhat over 69 milligrams per cubic meter, and that a workman could be continually exposed day in and day out throughout the working day to a continuous concentration to that extent without suffering harm (R. 571 and 572). That he has never seen soluble alkali dust in sufficient concentration to produce definite harm (R. 574), nor has he ever read nor heard of a case of injuries to the respiratory organs arising from the inhalation of metasilicate dust, phosphate of soda dust or soda ash dust. That he has never seen a workman who has suffered any harm from the inhalation of alkali dust, although he has had quite some experience with these cases, having examined individuals numbering into the hundreds, who had been using materials of that kind, as well as having used the same experimentally on animals (R. 575-577). That if a person was exposed to the inhalation of an alkali dust of an irritating nature, the first effect would be on the conjunctiva of the eye, and thence an irritation of the upper air passages of the nose and throat, which would be intensely irritated. In coming into the nostril it meets an atmosphere saturated with moisture, and the individual dust particles would absorb moisture, increase in size and weight and, if they were not actually dissolved in the mucous membranes of the nose and throat, that they would cause whatever trouble they could on these passages, and that very little would reach the lung; that if any did go beyond the nose and throat, it would produce bronchitis, generally distributed throughout both lungs, which would cause increased secretion and immediate dilution of the material which would be thrown off in expectoration. That it would be impossible for alkali dust of an irritating nature to get into the lungs without affecting the nose, throat, and other parts of the respiratory organs. *That no experimental work had ever been done with a soluble dust to determine the proportion that reaches the lung,* but with insoluble dust, over 50% of the dust particles are deposited in the nose, from 2 to 10% are swallowed, and anywhere from 20 to 40% ultimately reaches the lungs. As to soluble dust, much less would reach the lungs (R. 577-579). That on an inhalation of irritative dust, there could not be a concentration of the bronchiectasis, as in this case. It would have to be uniformly distributed throughout both lungs. That dilitation at one point implied some definite obstruction at that point, which may not have been preceded by any inflammatory infection at all, but might come from inhalation of some mucous or food particles after etherization (R. 580).

Francis Hammond, called on behalf of the defendant, testified that he was a chemist and foreman of the Phosphate Department of the defendant plant, and, as such, was in charge of Maty, the plaintiff, when he worked in that department. He testified that he was in the vicinity of Maty continually during his employment, and that Maty spent 4 days out of each 5 outdoors and that Maty had no work with any soda ash while in the Phosphate Department. That he did not work with metasilicate, and worked for only a few days with phosphate of soda, occasionally repacking phosphate of soda in another building. That dust conditions were satisfactory in the Phosphate Department, and that Maty's work while indoors in the Phosphate Department was with liquids (R. 623-626).

Morris Murphy testified on behalf of the defendant, that he was a chemist and foreman in the Silicate of Soda Department, and that as such he was Maty's foreman while he worked there. That the conditions the plaintiff worked under were very good with respect to dust and that the plaintiff never complained of dust conditions. That he never saw the plaintiff cough, nor did the plaintiff ever complain to him about a cough (R. 627-630).

George Sitch, called on behalf of the defendant, testified that he was a fellow-worker with the plaintiff during his period of employment in the Silicate Department, and that he had been employed there for 6 years. That he worked the same furnace that Maty did during his period of employment there, and testified that he never saw Maty cough and that the plaintiff never complained about a cough to him (R. 664-666).

Andrew Reneta, called on behalf of the defendant, testified that he worked at the Grasselli Chemical Company for 10 years, in the Phosphate Department, and that he worked during the period of Maty's employment there. That he was on the same shift with him every 3rd week and that plaintiff never worked with soda ash in that department, but worked on the opposite side. That he had never seen him cough nor had he ever complained of a cough (R. 670-672).

Harold G. High testified that he has worked for the defendant company since 1920 as Personnel Director and

Safety Supervisor of the defendant company, in charge of safety, sanitation and personal injuries (R. 673 and 674) and that he had conferred with the plaintiff with respect to his ailments (R. 676). That he complained constantly of an itch under his arms and around the groin, but that he never complained of a cough, nor of a pain in any section of his chest. That his only complaint was the itch (R. 676 and 677). That he first heard that the plaintiff was making a complaint of a lung condition in the summer or fall of 1935, but that no complaint had been received prior to that. That the plaintiff left the plant on October 23, 1933 (R. 678). That in his duties as a personnel man he has never had a case of a lung injury or any inury to the respiratory system, in connection with phosphate of soda, soda ash or metasilicate. That he has personal knowledge of all injury reports, and that he has had cases of irritation of the hands around the wrist where the clothing would irritate, but cannot r[illegible]ingle case where the face was irritated (R. 679). That [illegible] plaintiff's itch was originally diagnosed by the plant physician as occupational in nature but that was corrected by Dr. Oleynick as positively non-occupational (R. 682). The Labor Department further held that his itch was non-occupational and non-compensable (R. 683).

Plaintiff called as a rebuttal witness, Felix Smietana. He testified that he worked for the defendant company for 27 years and had never experienced any skin ailments in the Silicate Department. That the only irritation he had was about two years ago when he suffered a skin rash while working in the Phosphate Department. This skin rash did not relate to soda ash (R. 691-694). Charles T. Davis testified that this rash came from handling trisodium phosphate (R. 707).

Lauren Pohlman was also called as a rebuttal witness. He testified that he was an architect and had had experience in ventilation. He further testified that in his opinion the ventilation in the Silicate Department was inadequate, although he did not count the number of windows because there were so many things to see; that there was a considerable number of windows in the Silicate Department. He had inspected only the Silicate Department (R. 695-700).

At the conclusion of the testimony, the defendant moved for a directed verdict in its favor upon the following grounds:

(1) That the plaintiff had failed to establish negligence on the part of the defendant with respect to the operation of the Silicate Department or the Phosphate Department; that as negligence necessarily involves a violation or disregard of some duty which is known to the person charged therewith, it follows that knowledge of the facts out of which the duty arises is an essential element for consideration in determining whether one has exercised reasonable care or has been builty of negligence.

(2) That the plaintiff had failed to establish that his condition of ill health was proximately caused by the alleged exposure in any departments of the defendant's plant or that the alleged exposure was the causa causans of his condition.

(3) That the plaintiff had failed to establish that he was exposed to soda ash dust while working in the Phosphate Department, where he last worked, and that since his last alleged exposure in the Silicate Department occurred more than two years prior to his instituting suit, his action was barred by the Statute of Limitations (R. 708-725).

Protracted argument followed the making of this motion from which it will readily appear that the trial judge was minded to grant the motion, but refrained from doing so solely because the trial of the cause had lasted almost two weeks (R. 708-725). During the course of the argument, the trial judge made the following pertinent and most significant statements:

> "The Court: There isn't a thread of evidence as I have seen that the company had any knowledge that sodium carbonate was injurious to the lungs" (R. 718).
>
> "The Court: * * * Now, the fact is that the only knowledge they had—in the first place, you come into court with a theory that your own expert cannot support when any investigation is made of it. Then secondly, the only knowledge that they had is that this sodium carbonate material, an alkali, not as you tried to pretend a poisonous and corrosive alkali, is irritating to the skin. Now, for that I am very doubtful that there is any deduction that it will cause lung abscess" (R. 720).
>
> "The Court: Not only has there been no evidence of any knowledge but I say the proofs in this case from plaintiff's own witnesses, that the men who have worked there for years, have never had a lung injury, is conclusive" (R. 721).
>
> "The Court: I am going to let this case go to the jury because we have been here so long, but I am telling you, Counsel, that my view of the matter is that any verdict they may bring in will have to be set aside by me" (R. 722).
>
> "The Court: Of course, I think it is very questionable if there is any evidence to sustain a verdict of subjection in the phosphate department" (R. 724).
>
> "The Court: * * * I am very doubtful that plaintiff could possibly sustain a verdict in the Court of Appeals on either knowledge or having suffered from the negligence of the company in the phosphate department * * *" (R. 724 and 725).

Defendant's motion was denied, but with obvious reservations and doubts on the part of the trial judge.

In his charge to the jury the trial judge said in part as follows:

> "You will remember that the chemist, Dr. Gettler, I felt had one theory when he started and finished up

> with another theory when we had further testimony and when I had this impartial witness. Now I don't want to waste either of our times by criticising Dr. Gettler. He said that he didn't change his theory, that we simply were so 'dumb' that we didn't understand—he didn't use the word 'dumb' but that was the effect of it, that we didn't understand the learned character of his theory. It is difficult for me to accept that idea. He stated that this soda ash when brought in contact with water made sodium hydroxide which admittedly he stated, is a very caustic and corrosive substance which burns when applied to any of the lung tissue. He afterwards changed that view and admitted that it did not make sodium hydroxide at all, but that the soda ash or sodium carbonate when mingled with water was hydrolized and the hydrolization produced ions of hydroxyl which was an entirely different thing from sodium hydroxide and not nearly as alkali; in fact the testimony of the impartial chemist was that it was as one to four" (R. 745).

The court further charged the jury:

> "The plaintiff has offered no proof to the effect that any employee of the defendant company working in the Silicate or Phosphate Department has at any time suffered any injuries to his respiratory organs or any part thereof (R. 746).

The jury returned a verdict in favor of the plaintiff, and defendant company moved for judgment notwithstanding the verdict or, in the alternative, a new trial (R. 812 and 813). The court, upon procuring consent of counsel to such a procedure (R. 756 and 757), directed a verdict in favor of the defendant, placing his decision on the ground that there was not sufficient knowledge attributable to the defendant company (R. 784), although the court indicated that it was not necessary to go into the other available grounds to sustain his decision. In this connection the court said:

"Well, my view of the matter is that your plaintiff hasn't got a chance of winning in the court of appeals in my view of the matter; there isn't sufficient knowledge attributable to the defendant in this case, not to go into any of the other phases of the matter * * *, apart from the very doubtful question of whether or not the actual disease was caused and the other doubtful question of whether you can conceivably say that there was enough soda ash exposure in the outside plant where he was working * * * phosphate plant where he was working" (R. 783 and 784).

ARGUMENT

I. The trial judge was correct in holding that there was not sufficient knowledge attributable to the defendant company that the products used at its plant were dangerous and of a nature likely to harm the plaintiff, and that there was no evidence to indicate that the defendant knew or should have known of any injuries likely to result from the exposure to soda ash.

The proofs were uncontradicted that no other employee in the history of the defendant's plant, or in the history of the Solvay plant—who are the largest manufacturers of soda ash in the country—had ever sustained a lung injury, or, in fact, any injury at all from the inhalation of soda ash. In fact, not a single witness, either expert or otherwise, for either side, had ever heard of a lung injury or injury to the respiratory tract being produced by the inhalation of this chemical dust. Plaintiff produced, as experts, Dr. Runnells, Dr. Gettler and Dr. Gluckman, and all three testified that they had never heard or read of such an injury. The defendant produced Dr. Pollak, Dr. Fine, Dr. Chaffe, Dr. McCallion, and Dr. Smyth, and all five testified that they had never, in all their research and experience, heard of, read of, or encountered such a consequence. The plaintiff produced no workmen from the defendant's plant who had experienced similar injuries—or any injuries—although many actually testified for other purposes, and the Court charged the jury to that effect (R. 746). The only experience testified to by any witness was an irritation of the skin, diagnosed by Dr. Chaffe (R. 315), as a mechanical irritation when rubbed by the clothing, such as would be received as a consequence of any form of dust—purely a mechanical factor.

Soda ash (sodium carbonate) is so generally known and accepted as a harmless product, or to be put in another way, has had such a satisfactory experience in not causing injuries of any sort to employees and others engaged in manufacturing or handling this product that among specialists in industrial Hygiene such as Dr. Smyth, Jr. and Dr. Smyth, Sr., both connected with the Department of Industrial Hygiene of the University of Pennsylvania, soda ash has not been investigated and assigned any safe limits giving the maximum allowable concentration for prolonged exposure. As a result, these experts had to use the safe limit for ammonia vapor which is of the same degree of alkalinity and irritation. (R. 568 and 571.) The conclusion is therefore inescapable that this product is in fact and is generally recognized and accepted as being harmless. Dr. Smyth, Sr. has been assigned to and taken part in highly important commissions engaged in investigating industrial conditions (R. 570 and 571). He said in part (R. 577):

> "I have had some experience with the inhalation of alkaline dusts, yes, in the manufacture and use of vitreous enamels that contain, among other ingredients, alkaline silicate material. I have never seen any harm from the alkali in those mixtures to the individual working with them. I have examined a number of individuals, numbering up into the hundreds, who have been using materials of that kind. * * *"

We respectfully submit that two factors must be borne in mind with respect to the testimony:

1. That not a single witness, expert or otherwise, has ever heard of, seen, or experienced a single case of lung injury or injury to the respiratory tract caused by inhalation of soda ash, and the medical records are bare of any such instances. (This is conceded.)

2. That plaintiff suffered a skin eruption in 1931 which was diagnosed as a non-occupational condition by a skin specialist and was so held by the Department of Labor of the State of New Jersey. It was by this irritation concerning which no witnesses were produced claiming it to be occupational and due to the soda ash that the plaintiff contends the defendant was placed on knowledge of the irritating nature of soda ash and warned of the possibility of the subsequent lung injury.

It is well to recall in this latter connection that Dr. Oleynick, a physician specializing in the treatment of skin and entirely disassociated with the defendant company, made patch tests on the plaintiff with the very chemicals that the plaintiff worked with (R. 465 and 475) in an effort to diagnose his skin condition; that he was further impressed with the fact that there was no irritation on face and exposed parts (R. 465 and 468), and that the plaintiff proved to be negative to the chemicals with which he was tested. Testimony will reveal that Dr. Oleynick made a diagnosis of a ringworm infection and definitely classified the case as non-occupational (R. 467).

The law is definitely settled and established that in any cause predicated upon the charge of negligence, knowledge of the condition charged is an essential element to be established by the plaintiff. That this rule of law was recognized by the plaintiff will at once appear from Paragraph 6 of the original and amended complaints (R. 789 and 804) wherein plaintiff alleged that "defendant had knowledge of the dangerous effect of the inhaling and breathing in of the said substances." The plaintiff assumed the burden of establishing these material allegations, and the law imposed that duty upon him. Plaintiff failed in any manner whatsoever to sustain this *sine qua non* burden, and having failed his case must necessarily fail. Proof of this essential element of knowledge must be made in all manner of causes predicated upon negligence and not alone in causes involving alleged injuries to employees.

It is submitted that the recent case of *Pennsylvania Pulverizing Co.* v. *Butler,* 61 F. (2d) 311 (Third Circuit, 1932) completely and adequately disposes of the issues of this case favorably to the defendant and requires that the judgment for the defendant be affirmed. The legal questions involved are most adequately discussed by Judge Wooley. A brief review of the facts and law of the case will appear from the following:

The defendant company was engaged in grading and pulverizing silica sand. Although much of the sand movement was in air-tight passages, the operations as a whole were dusty. Plaintiff contracted the disease of silicosis. Plaintiff testified that as part of the operation of conveying sand, a belt conveyor ascended through an open shaft with open buckets of sand, and that the dust therefrom was very bad; that there was no ventilating system on this operation except windows which were kept shut to prevent the sand from blowing off the belt. The defendant had installed a modern exhaust and ventilation system. On page 314, the Court said:

> "The plaintiff's evidence of the defendant's ventilating system might show negligence were it permissible to infer negligence from the fact of the plaintiff's injury, or it might show a spark of evidence of negligence from the fact that the windows in the tower were kept closed.

But without more to prove that keeping the windows closed need not, in an orderly manufacturing process, have been done or should not, for the plaintiff's protection, have been done, that evidence, standing alone, is not enough to submit to the jury, or, if submitted, is not enough to sustain an affirmative finding of negligence. It left uncertain and unproved, and therefore left the jury to conjecture, whether the defendant did something it should not have done or failed to do something it should have done."

On the question of knowledge, the Court said on page 317:

"*We think the real trouble on this issue of warning is that the plaintiff complains that the defendant did not warn him of the pathological effect of inhaling silica dust. This may be true, but it is not certain that the defendant knew or should have known it in time seasonably to warn the plaintiff. We find no evidence on the part of the plaintiff charging the defendant with knowledge of the disease.* Nor is there evidence that the disease normally follows contact with silica dust, or what conditions will produce the disease, or how long it takes to develop, or when developed, what precisely is its character. We find it difficult to believe that an employee of normal intelligence working in dust has to be told that inhaling dust of any kind in large quantities is injurious for, obviously, when he is handed a mask and put to work with other men wearing masks in a place equipped with artificial ventilators, that is a plain enough warning that dust is deleterious. We cannot find, on the plaintiff's showing, substantial evidence that the defendant failed in its duty to give the plaintiff adequate warning of the dangerous character of his occupation." (Italics ours.)

"We are constrained to hold that the learned Trial Court erred in submitting the case to the jury and in refusing to direct a verdict for the defendant on the ground that the plaintiff had failed to prove by substantial evidence any one of the four allegations of negligence on which he rested his case."

The following cases which deal with injuries to employees, also sustain the contentions urged in behalf of the defendant.

In *Grammer* v. *Mid-Continent Petroleum Corporation*, 71 F. (2d) 38 (Tenth Circuit, 1934), cert. denied, 55 S. Ct. 82, decedent was employed as a tank cleaner. He worked from April 4, 1921, until at or about the time he became ill with some lung trouble and died on July 7, 1932. His condition was diagnosed as pneumoconiosis, a disease characterized by the formation of a deposit in the lungs, the growth of fibrous tissue, and caused by the inhalation of foreign matter. Decedent's doctor testified that by the process of elimination, he deduced that death resulted from his occupation. The trial judge directed a verdict for the defendant and this was sustained on appeal. Until the instant suit was brought, no occupation disease had been known to result.

On page 40 with respect to the cause of death the Court said:

> "Among other reasons for directing a verdict, the Trial Court was of the opinion that there was no substantial proof that death resulted from his work. The proof is most unsatisfactory. Conceded that death resulted from pneumoconiosis, the doctor's opinion that it came from his work was formed as he says, because he could find no other reason for it. However, pneumoconiosis concededly results from deposits of foreign material, and Grammer did work in a dust-laden atmosphere. That the doctors never knew of another still worker being so effected, and that the medical books tell of no other, goes to the weight of the evidence."

The Court made a distinction between substances which are inherently dangerous and substances which are dangerous only when present in unusual quantities. It suggested but impliedly did not accept the rule that where employees work with known poisons, the employer must search for lurking dangers, and is held to know whatever science might discover (page 41). In fact, the Court suggests cases to the contrary. If the substance is not inherently dangerous, then the element of knowledge becomes important. On the question of knowledge the Court said on page 41:

> "*It is not contended that appellee in fact knew that pneumoconiosis or any other occupational disease would follow from its practices. In fact, no one knew it, for the doctor explored medical books in vain to find another such history.* That the still cleaners worked steadily for years without illness strongly evidences that appellee had no knowledge nor reason to suspect that occupational disease might follow long years of service. The Vice-President in charge of refining operations for appellee testified, without contradiction, that in 26 years' refining experience, he had never heard of another such case." (Italics ours.)

With respect to working in heat the Court said on page 42:

> "Furthermore the heat was not a contributing factor to the thickening of the fibers of the lung. Exposure to heat may well have lowered Grammer's resistance to disease, just as all hard work takes its toll. The surgeon at the operating table and the nurse at his side, the captain on the bridge of a liner and the stoker in the hold, the lawyer at the trial table and the judge on the bench, all give something of themselves to their tasks. But the lowering of resistance that comes with all hard work, is not actionable."

On page 44 the Court said:

> "To bring herself within the rule of inherently dangerous substances, upon which her case is bottomed, there must be proof not only that the combination of harmless substances was harmful, but that appellee should have known the combination was fraught with danger. There is no such proof. Appellee knew that carbon monoxide and hydrogen sulphide, in concentrated form, were deadly, just as nicotine is a deadly

> poison. In minute quantities, the carbon monoxide from a wood fire is no more harmful that smoke from a cigar; and a minute amount of hydrogen sulphide, although offensive to the olfactory nerve, is not rated as a deadly poison."

The cases of *Pennsylvania Pulverizing Co.* v. *Butler, supra,* and *Grammer* v. *Mid-Continent Petroleum Corporation, supra,* continue to be cited with approval. *Giant Storage Battery Co.* v. *DeLay,* 87 F. (2d) 726 (Eighth Circuit, 1937).

The case of *Canfield* v. *Iowa Dairy Separator,* 172 Iowa 164, 154 N. W. 434 (1915), arose out of an action by an employee to recover damages on account of a disease claimed to have been contracted as a result of the use of certain acid and oils. The plaintiff claimed that he was injured externally and internally. The trial judge directed a verdict for the defendant and this was sustained on appeal. On page 436 the Court said:

> "Nowhere in the plaintiff's petition is it charged that the defendant knew, or by the exercise of reasonable diligence should have known, that these cones, when they came to the plaintiff, were in a condition that rendered it dangerous and unsafe for the plaintiff to handle them in the work assigned him to do; nor is there any proof that the defendant knew that the dipping of these cones in muriatic acid in the manner shown by this testimony rendered it dangerous and unsafe for the plaintiff to handle them in the discharge of his duties; nor are any facts alleged or shown from which an inference could be drawn that the defendant knew, or by the exercise of ordinary care should have known, that the handling of these cones in the condition in which they were might affect plaintiff's health or inflict upon him any bodily injury."

• • • • • • •

And further:

> "It does not appear that any other person in the employ of the defendant suffered the effects complained of by the plaintiff while in defendant's employ in the same capacity."

See also *Roessler & Hasslacher Chemical Co.* v. *Peterson*, 134 Fed. 789 (Third Circuit, 1905) and *Corcoran* v. *Wanamaker*, 185 Pa. 496, 39 Atl. 1108 (1898).

An interesting group of cases which are particularly applicable to the facts of the instant case arise out of cases dealing with creosote poisoning. It was the contention of the plaintiff in the case at bar that the mere fact that some of the employees acquired occasional skin irritation on the hands was sufficient to put the defendant on knowledge with respect to possible injuries from inhalation of dust into the lungs and respiratory organs. In this connection it must be recalled that every single doctor, including Dr. Gettler, who testified in this case, whether for the plaintiff or the defendant, testified that he had never heard or read of a case of a lung injury from the inhalation of dust from soda ash, meta-silicate or phosphate of soda. Their medical experience in this connection was confirmed by the practical experience of the representatives of the defendant company's plant, and of the chief chemist and chief surgeon of the Solvay Process plant. In this connection the following case which deals with creosote poisoning is most helpful and again disposes of the issues involved favorably to the defendant and adversely to the plaintiff.

The case of *Pinkley* v. *Chicago & Eastern R. R. Co.*, 246 Ill. 3[illegible], 92 N. E. 896, 35 L. R. A. (N. S.) 679 (1910), presents the following facts: Plaintiff worked in yards of defendant handling pine piling, freshly treated with creosote or a coal tar preparation of creosote. Plaintiff and other employees had during certain months observed fumes coming from these preparations which caused a burning sensation, and sometimes caused the skin on the face and arms to blister and peel off. In August, 1907, plaintiff and a few other laborers were directed to unload piling from a coal car which had just arrived. The timbers had been freshly treated. It was a hot day, and the preparation was dripping. The foreman furnished the men vaseline for their face and hands. All the men experienced the usual burning sensation excepting that plaintiff suffered a severe case of dermatitis venenata or eczema of long duration and which was very painful in nature. Pustules and sores formed around his mouth and nostrils. The medical testimony showed that creosote is a poison, and that when highly concentrated and in large quantities, it may throw off fumes which, coming in contact with the skin or membrane of the nose, may cause an irritation thereof. The testimony for defendant, both lay and medical, was to the effect that the plaintiff's case was the first report of poisoning from the preparation received by them. It also appeared that on the same day that plaintiff suffered his injuries, several other men handling timbers containing creosote received burns necessitating medical treatment, but that the injuries of all except one of the men and the plaintiff were of a temporary nature and readily yielded to treatment. The Court said as follows:

> "Does the fact that the injuries which appellee received were more serious than he anticipated, and resulted in a disease of a permanent nature, render appellant liable in this case? In our judgment, under the facts disclosed by the record, it does not. The record shows that appellant, as well as other companies, had been using this coal-tar preparation on timbers for a number of years, and fails to disclose any injuries other than blistering and peeling off of the skin, except in the case of appellee and an employee of the Illinois Central Railroad Company on the same day. Out of

about 125 men who had worked for appellant and had handled timbers treated with creosote, appellee was the only one who ever claimed to have been permanently injured by the creosote or creosote fumes. None of the men working with appellee on August 6th suffered any injuries from working with the piling, other than the burning sensation and the blistering and peeling off of the skin. So far as the record discloses, appellee was the first person to sustain any serious or permanent injuries from handling timbers treated with creosote, during the many years this substance has been in use as a preservative for wood. Under such circumstances, a finding that appellant knew, or by exercising ordinary diligence might have known, that the coal-tar preparation was liable to produce the injuries of which the appellee complains, is manifestly without any evidence whatever to support it. If the appellant did not know, or by exercising ordinary diligence could not have known, that such injuries were liable to result, then the law did not impose any duty upon it to warn appellee of the danger of receiving such injuries, before or at the time of giving the order which appellee alleges was negligently given.

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And further:

"There is in this record no evidence tending to show that appellant could reasonably have been expected to anticipate that appellee would be seriously or permanently injured in obeying the order to assist in unloading the piling from the car, and, under the principle announced in the foregoing cases decided by this Court, the appellant cannot be held liable for those injuries."

Davis v. *New Jersey Zinc Co.*, 116 N. J. L. 103, 182 Atl. 850 (E. & A. 1936), indicates the difference between the instant case and the type of case in which prior experience has been had with reference to the particular element in question. In that case, plaintiff brought his action for illness claimed to be the result of manganese poisoning and contracted from inhaling and ingesting manganese dust which pervaded the picking room in which he worked. The court said on page 104 (N. J. L.):

> "Defendant was engaged in the business of mining, crushing, separating and concentrating zinc ore and other minerals and employed plaintiff in what was known as its picking room. There was ample proof that this room was pervaded by manganese dust alleged to be poisonous in its nature. While manganese dust, as a source of poisoning, presents to some extent a recent acquisition of knowledge, nevertheless there was evidence which indicated that the defendant was chargeable with notice of its dangers. Numerous cases of manganese poisoning had their origin in its plant and since 1918 it had employed consultants for its dust poisoning problems."

See also *Sweany* v. *Wabash Ry. Co.*, 80 S. W. (2d) 216 (Missouri, 1935), where the court held that the refusal of the trial court to grant the following instruction was reversible error:

> "The Court instructs the jury that although you may believe from the evidence that the plaintiff suffered injury from inhaling fumes from the creosoted ties described in evidence, yet if you further find from the evidence that the defendant did not know or could not have reasonably anticipated that such result might follow the unloading of such ties, then the defendant cannot be held responsible for such results and the plaintiff cannot recover and your verdict must be for the defendant."

The court held that the defendant was not entitled to a directed verdict only because of the repeated cases of poisoning from creosote fumes. This case was decided in 1935. It did so in the following language (page 221):

> "Courts, in the repeated holding that the harmful effects of creosote fumes, if harmful, is by reason of novelty excluded from contemplation, cannot be expected to so hold after repeated cases present experience from which employers may become so informed as to have the question of harmful effects in reasonable contemplation."

The court held that it was error to exclude evidence as to general experience of those who have worked in creosote fumes or are shown to have had experience touching such working conditions.

It is further respectfully submitted with respect to the question of knowledge that the plaintiff has based his entire case upon a chemical reaction of an extremely caustic nature—that not only was controverted by the experts for the defense but that was retracted by Dr. Gettler, the witness for the plaintiff, who propounded the theory. The defendant contends that under circumstances such as these —where a reaction depends upon a chemical theory that has been exploded—not only does this go to the principle of proximate causation, as will be argued later, but it also raises a presumption in the defendant's favor with respect to knowledge.

In connection with this discussion on the question of knowledge, it must be recognized that the law contemplates only a person of average strength both of mind and body, and imposes no duty upon an employer to guard against injuries to persons with special susceptibilities unless knowledge of these susceptibilities is actually had by the employer. The objective standard is fixed by the Courts and not any subjective standard. *Ward* v. *West Jersey & Seashore R. R. Co.,* 65 N. J. L. 383, 47 Atl. 561 (Sup. Ct. 1900); and *Stevens & Sons Co.* v. *Daigneault,* 4 F. (2d) 53 (First Circuit, 1925). This settled rule of law becomes of importance in this case in the light of Dr. Gluckman's testimony that the plaintiff may have been hypersensitive (R. 291). No attempt was made to prove or even to suggest even by inference that defendant had knowledge or even notice of any special hypersensitiveness of the plaintiff.

It is respectfully submitted that an alleged injury dependent upon an unproven chemical theory that is withdrawn by the very propounders thereof, is incapable, either in logic or in law, of engrafting knowledge thereof on a defendant for the purpose of placing responsibility.

II. That the Plaintiff failed to establish that his illness was proximately caused by alleged exposure in any department of the defendant's plant or that the alleged exposure was the causa causans of his condition.

The testimony discloses that the plaintiff's case was based throughout on the testimony of Dr. Gettler, which was predicated on a severe caustic reaction, *i.e.*, $Na_2CO_3 + H_2O \longrightarrow NaOH$ (sodium carbonate plus water gives sodium hydroxide). Counsel for the plaintiff was explicit throughout the trial in that he would stand or fall by Dr. Gettler's testimony (R. 736) and based all following hypothetical questions to his experts on that testimony.

In the light of the repudiation of the theory so advanced, both through the contradiction by the defense experts, Dr. Chaffee (R. 315), Mr. Davis (R. 326), Mr. Heard (R. 378), and by the impartial chemist, Dr. Wiener (R. 331), as well as the retraction by Dr. Gettler himself (R. 339), and the direction of the Court to disregard such testimony (R. 745), it is respectfully submitted that all the testimony based on the former theory must fall. The Court struck from the record all testimony of plaintiff's experts, Dr. Gluckman and Dr. Runnells, that was based on Dr. Gettler's testimony (R. 371), and it is submitted that all the testimony of both witnesses comes in that category. As evidential of this point, it is interesting to note the testimony of Dr. Runnells (R. 269):

> "If you grant that this was the condition and he did inhale soda ash and it produced the corrosive effect that has been testified, then he would have had a long continued chronic inflammatory condition of his bronchial mucous membrane and his lungs."

And further (R. 271):

> "The Court: The doctor has given it as his opinion that if there is this irritation from caustic soda, that that might be a producing cause of the abscess, isn't that correct, Doctor?
> The Witness: Yes, sir."

Dr. Gluckman testified in answer to a question as to whether or not he had ever heard of another case of lung abscess resulting from inhalation of phosphate of soda or soda ash dust (R. 288):

> "No, I cannot say that positively. This was the first time that I have ever seen soda ash or phosphate of soda chemically analyzed and a report given by a man like Dr. Gettler."

It is submitted that a reading of the testimony, and the excerpts such as are quoted above, unmistakably establishes that the testimony of both these experts was based upon Dr. Gettler's testimony and was accordingly stricken by the Trial Court (R. 371).

It is submitted, however, that it was not necessary for the Court to base its direction of the verdict on this ground, and that the Court's failure to do so may not be interpreted as declaratory of its non-existence; on the contrary the language of the Trial Judge during the course of the trial (R. 724 and 725; 783 and 784) is strongly indicative of his opinion contra. Aside from the failure of proof from a technical standpoint, the respondent submits that there was not even a scintilla of evidence of probative weight to be submitted to the jury on this question.

It is, of course, unimpeachable and unworthy of prolonged argument that the Federal Courts have repudiated the scintilla of evidence rule and have adopted the rule of substantial evidence. See *Western and Atl. R. R. Co.* v. *Hughes,* 278 U. S. 496, 73 L. Ed. 473 (1929), where Mr. Justice Brandeis spoke as follows (P. 474, L. Ed.):

> "The railroad asserts that the scintilla of evidence rule prevails in Georgia; and argues that the Lower Courts erred by applying the local rule in this case. It is true that submission to the jury of contested issues of fact is not required in the Federal Courts, if there is only a scintilla of evidence (Baltimore & O. R. Co. *v.* Groeger, 266 U. S. 521, 524, 69 L. Ed. 419, 422, 45 Sup. Ct. Rep. 169), that it is the duty of the judge to direct the verdict when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party (Elliott *v.* Chicago, M. & St. P. R. Co., 150 U. S. 245, 37 L. Ed. 1068, 14 Sup. Ct., Rep. 85; A. B. Small Co. *v.* Lamborn & Co., 267 U. S. 248, 254, 69 L. Ed. 597, 600, 45 Sup. Ct. Rep. 300), and that this federal rule must be applied by State Courts in cases arising under the Federal Employers' Liability Act."

See also *Gunning* v. *Cooley,* 281 U. S. 90, 74 L. Ed. 720 (1930); *Penna. R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 77 L. Ed. 819 (1933).

Contrasting then, the proofs as submitted by the parties litigant, we have on behalf of the plaintiff the proposition advanced that the exposure to soda ash dust necessitated inhalation, that the inhalation of soda ash caused a severe chemical reaction that resulted in a lung abscess in the lower right lung and that the other lung was clear and unimpaired (R. 656).

On behalf of the defendant, Dr. Fine (R. 522), Dr. Pollak (R. 494), and Dr. Smyth (R. 580) testified that upon the inhalation of any foreign substance it would necessarily as an anatomical requirement, be equally distributed into both lungs because of the distribution and division of the bronchii, and that the irritation, caused by the chemcial reaction, would necessarily assert itself all along the respiratory tract and in the conjunctiva of the eyes. This was impossible to controvert; even the expert witness for the plaintiff, Dr. Runnells (R. 654), was forced to admit this, and Dr. Gluckman offered no testimony contra.

It must be remembered that this plaintiff had been examined by Dr. Harold A. Tarrant, a witness for the defendant, upon the cessation of his employment with the company in October, 1933, and was found to have at that time a normal chest, with a 3 inch chest expansion, with no cough, rales or other symptom of any lung injury; that subsequently he was examined by four different physicians, Drs. Oleynick, Kessler, Novella and McCallion respectively, for a ring-worm infection, wrist injury, preliminary examination for a herniotomy and a herniotomy. To none of these doctors, all disassociated with the defendant, was any complaint made of a lung condition; none of them observed or was told about a cough; all found the man normal as far as their examination disclosed, and received no complaints. He was given a general anesthesia for his hernia operation in June, 1934, some eight months following his last date of employment, *i.e.,* October 23, 1933, and following this had a normal convalescence. He was confined to bed in the hospital for seventeen days and he was sent home, where, after three days, he began to cough and expectorate pus. Dr. Fine testified for the defendant that it was impossible to have been caused by the inhalation of dust and that, with the foregoing history, the probable cause, a very common thing, was the "shooting of an embolus" (R. 534) from the seat of the operation, caused by his ambulation.

There is the further significant and conclusive fact that no attending physician was produced by plaintiff to testify with respect to any lung condition or cough of the plaintiff for any time prior to the summer of 1934 and after he had returned home from the hospital. Dr. Steele saw him then (R. 227). The plaintiff left the employ of the defendant in October, 1933. Drs. Runnells and Gluckman were not his attending physicians but merely examined him as experts for the purpose of testifying in this case. Dr. Runnells first saw him in September, 1935 and shortly before suit was commenced (R. 267), and Dr. Gluckman saw him in October, 1935 and shortly after suit was commenced (R. 283).

The plaintiff produced not one witness who could testify to the degree and amount of inhalation of dust; who could account for the failure to produce a bilateral effect in the lungs; who could account for the failure to produce an irritative effect on the other mucous membrane leading from the nose to the lungs or on the conjunctiva of the eyes, or who could do anything but predicate his opinion on the repudiated chemical theory of Dr. Gettler. The possible and probable causes were numerous; an ether embolus; an embolus from the seat of the operation; a tooth or a nail; an infection; a severe cold, and many other known and unknown causes.

It is also submitted as being very noteworthy that, as testified to by Drs. Pollak and Fine, both of whom are leaders in their profession, specializing in lung conditions and diseases, that an irritation so alleged would be instantaneous, and would occur, as Dr. Fine said, within twenty minutes. Accordingly can it be within the realm of possibility, much less probability, that the plaintiff, who ceased his employment with the Grasselli Chemical Company on October

23, 1935, was examined or treated by four different physicians for various causes, neither exhibiting nor making any mention of a cough or lung condition; was given a general anesthetic in the hospital some eight months later after a careful examination of his chest and lungs as a preoperative precaution; enjoyed a normal convalescence while a patient in the hospital during a period in which customarily the pulse, temperature, and all other reactions are necessarily noted; returned home and was taken sick three days later, and that all this undisputed and uncontroverted history notwithstanding, can still attribute his illness to his former employment, in which no one else ever sustained an injury nor from which no expert for either side ever heard or read of, in medical journals or in personal experiences, causing a lung injury or injury to the respiratory tract?

It is respectfully submitted that the plaintiff has fallen far short of the degree of proof required of him. It must not be speculative, or even a merely possible inference; it must be positive proof—particularly in view of the rule of substantial evidence adopted in the Federal courts.

The law in this regard is clearly set forth in the case of *Patton* v. *Texas & Pacific Railway Company,* 179 U. S. 658, 45 L. Ed. 361 (1901). Mr. Justice Brewer said on page 663 (U. S.):

> "It is not sufficient for the employe to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of

> the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.''

It is also respectfully submitted with respect to the amount of exposure—that Dr. H. F. Smyth, Jr., testified—after making tests for the presence of total amounts of all soluble alkali dusts during the moments of peak production at the points where the plaintiff had worked—that the total air content of soluble alkali dust was far below the safe limit in which a man could be exposed during the continuous 8 hour day for his usual working conditions. *Dr. Smyth, Sr., testified that the safe limit to which a man could continually be exposed was 69 milligrams per cubic meter of air for ammonia fumes, whose reaction on the body was similar to that of soda ash.* Dr. Smyth, Jr., who performed the tests, testified that at the various points throughout the plant, the following maximum air content was found with respect to soluble alkali dust (R. 567 and 568):

1. In the mixroom: 5.15 milligrams per cubic meter of air.

2. Feeding platform of furnace No. 3: .014 milligram per cubic meter of air.

3. Dumping of a finished buggy of glass: 7.5 milligrams per cubic meter of air.

4. Oliver presses (Phosphate Dept.): .016 milligram per cubic meter of air.

5. Abbey Mill (Phosphate Dept.): .194 milligram per cubic meter of air.

The respondent does not wish, by pressing his point too often or strenuously, to weary the court with it, but it is felt that the matter of equal distribution into the lungs from the inhalation of any dust or fume is a matter of more than mere medical knowledge. There has, at no time, been any contention that the left lung of Mr. Maty was in any way harmed, and it was diagnosed as clear by both experts for the plaintiff and for the defendant. Granting the fact that there is no obstruction in the left lung, and this must be granted by the fact that it is a normal and healthy lung, which it would not be were there an obstruction (Dr. Runnells'' testimony (R. 654)), then whatever was inhaled into the right lung must necessarily have gone into the left lung. If the chemical formula suggested by Dr. Gettler, could in any way be applicable to cause this injury, there is no explanation for the fact that the left lung did not exhibit a similar condition, nor is there any reason why the nostrils, mouth, throat, trachea, bronchii and all other parts of the mucous membrane, saturated as they are with water, did not also exhibit a reaction to the chemical. From an anatomical standpoint, the lower apex of the right lung is the farthest removed from the point of entrance of dust or fumes; it is, accordingly the location that must necessarily receive less of the irritating substance than any place in the whole respiratory tract preceding it. It is submitted that this point is most noteworthy and the attention of the Court is again respectfully called thereto.

III. That the plaintiff as a matter of law had utterly failed to produce evidence that he endured any exposure to soda ash in the phosphate department, where he last worked, and since his last exposure in the silicate department was more than two years prior to his instituting suit, his action is barred by the Statute of Limitations.

While the defendant contends that the amendment to the complaint should not have been received—and the proofs accordingly limited to the Silicate Department—nevertheless, it also takes the position that even those proofs submitted, over its objection, by the plaintiff as to subjection in the Phosphate Department, fall far short of substantial proof, and hence, as a matter of law, a verdict should have been directed on the ground of the failure to prove negligence in that department, with the resultant application of the Statute of Limitations, since the plaintiff necessarily must show subjection in the latter department, to escape the statute. That the trial court leaned toward this opinion is indicated by its language found on Record page 724 as follows:

> "Of course, I think it is very questionable if there is any evidence to sustain a verdict of subjection in the Phosphate Department."

The uncontradicted proofs in the case set forth unmistakably that the plaintiff worked in the Silicate Department from December, 1928, until November 1, 1932. After November 1, 1932, he never returned or worked in the Silicate Department. He worked in the Phosphate Department from November 1, 1932, until October 23, 1933. The suit in this case was started on October 1, 1935. There is absolutely no proof in this case of any dust condition with respect to soda ash, phosphate of soda or metasilicate while the plaintiff was employed in the Phosphate Department. On his own testimony he worked outdoors three days every week and worked indoors around the Dorr plant two days a week. The superintendent, foreman and shift worker all testified that Mr. Maty worked outdoors four days a week and worked indoors only one day a week. At no time while he worked in the Phosphate Department did he handle soda ash, phosphate of soda or metasilicate, and when he did work indoors his work was exclusively with a product that was wet in nature and from which there could be no dust. Mr. Maty testified that he worked at times in the Dorr plant at a point about fifty feet away from where soda ash was used in an operation in the Phosphate Department. The drawing of the Phosphate Department which was prepared according to scale, shows at the far end of the phosphate room a soda ash storage silo containing an entirely enclosed conveyor system to a soda ash mixing operation. The soda ash is run from the silo to a soda ash scale tank and then to the soda ash mixing operation and is a completely enclosed operation with welded iron from which there can scarcely be any dust. From the plaintiff's own testimony he worked at least fifty feet away from the final step of that operation. Plaintiff's testimony was to the effect that he took sick in the Silicate Department and not in the Phosphate Department.

Plaintiff further produced as witnesses for the purpose of testifying to conditions at the defendant's plant the following five men, who were the only witnesses produced by him other than physicians: Paul Messaros, Joseph Laskoti, Tony Chuba, John Andricik, Lauren Pohlman.

Reviewing briefly their testimony and qualifications, it develops that Maty himself testifies that the only dust in the Phosphate Department was from phosphate rock (R. 87), and that he didn't get sick there (R. 36).

As to Messaros, he testifies that he never worked in the Phosphate Department (R. 173), and of course could not testify to conditions there.

As to Laskoti, there is no testimony whatsoever concerning the Phosphate Department, as he did not work with the plaintiff in that department (R. 187).

As to Chuba, he never worked in the Phosphate Department, except for odd jobs (R. 216).

As for Andricik, he only worked in the Phosphate Department for a period of six weeks in the fall of 1933 when the Barium Products Department was shut down and he only saw Maty there two or three times (R. 222-224).

As for Pohlman, who on May 11, 1936, made the inspection of the plant as the plaintiff's sanitation and ventilation expert, by order of Court on the plaintiff's motion—he did not inspect the Phosphate Department but merely inspected the Silicate Department—and of course offered no testimony with respect to any other department (R. 695).

These witnesses were the only ones produced who testified concerning conditions at the defendant's plant and it is respectfully submitted that it is impossible to predicate a finding of negligence in the Phosphate Department on such testimony.

Under the proofs as offered with respect to the Phosphate Department, it is respectfully submitted that there is no evidence whatsoever concerning dust conditions in that department to go to the jury, and that by reason thereof this action is barred by the Statute of Limitations. There was absolutely no proof in this case that there was insufficient ventilation in the Phosphate Department. Mr. Maty himself testified that there were windows in that department and that they were open. Mr. Pohlman, the architect (*supra*), testified with respect to ventilation in the Silicate Department, but offered no testimony as to ventilation conditions in the Phosphate Department since he had made no inspection of that department. The testimony on the other hand on the part of the defense was to the effect that there was no dust condition in the Phosphate Department with respect to the dust complained of by the plaintiff, and that there was adequate ventilation in that department.

Under this testimony, it is respectfully submitted that there was no evidence, either of injury sustained in the Phosphate Department, dust exposure in that department, or negligence in that department, and for these additional reasons, it is urged that the trial judge should have directed the verdict on this ground, as well as that of lack of knowledge.

IV. The Proofs were overwhelmingly in favor of defendant and required that a verdict be entered in its favor.

The proofs of this case were of such nature as to require the trial judge to direct a verdict for the defendant upon the conclusion of the testimony, or, having submitted the case to the jury—to enter a verdict for the defendant and a judgment for the defendant notwithstanding the original verdict for the plaintiff. It will be recalled that the trial judge allowed the case to go to the jury only after great hesitation and then with the statement that if the jury brought in a verdict for the plaintiff, he would have to set it aside (R. 722).

The law in the Federal Courts is definitely settled as to the duty of the trial judge to take the action which was taken in this case. That will at once appear from the case of *Patton* v. *Texas & P. R. Co.*, 179 U. S. 659, 45 L. Ed. 361 (1901).

The fact that an inspection of the premises of the defendant was made by the jury does not in any way disturb or affect the right of the trial judge to exercise this power. In the case of *Garland* v. *The Furst Store*, 93 N. J. L. 127, 107 Atl. 38 (1919), the Court of Errors and Appeals, in an opinion by Chancellor Walker held that even though an inspection or examination of the premises was made by the jury, that fact could in no event be conclusive and prevent the Court from controlling and considering the issue as a matter of law and that the question presented to the Court of Review should be decided upon what appears in the record brought up to the appellate tribunal notwithstanding that a view was had by the jury.

Discussion of Petitioner's Brief With Respect to Points B and C (Petitioner's Brief, pp. 19-33).

Petitioner's Brief in setting up Points B and C does in fact set up only one legal question arising from the merits of the case, and that question is covered by Point B and relates to the question of knowledge. We have hereinbefore discussed this question under Point I of this Brief (p. 77), and have shown conclusively that the trial judge was correct in holding that there was not sufficient knowledge attributable to the defendant company that the products used at its plant were dangerous and of a nature likely to harm the plaintiff, and that there was no evidence to indicate that the defendant knew or should have known of any injuries likely to result from the exposure of soda ash dust. In this connection it must be recognized and accepted that petitioner does not contend and cannot contend that the products to which she alleges the decedent was subjected are poisonous, noxious or inherently dangerous. The proofs were uncontradicted that no other employee in the history of defendant's plant, or in the history of the Solvay Process Co. plant to the knowledge of its plant physician over a period of thirty-five years, had ever sustained a lung injury, or any injury at all from the inhalation of soda ash dust. In fact, not a single witness, expert or otherwise, for the plaintiff or for the defendant, had ever heard of a lung injury or injury to the respiratory tract being produced from the inhalation of this type of dust.

Petitioner urges that the trial judge set aside the verdict for plaintiff and entered judgment for the defendant solely on the ground of knowledge (Petitioner's Brief, p. 20). This is not a correct statement of the grounds upon which the trial judge relied although he did assign the question of knowledge as the immediate ground. There were other grounds specifically mentioned by the trial judge, such as: "* * * apart from the very doubtful question of whether or not the actual disease was caused * * *", and "the other doubtful question of whether you can conceivably say that there was enough soda ash exposure" in the Phosphate Department (R. 783 and 784). It is therefore the fact that the trial judge relied upon three grounds, namely: (1) knowledge; (2) failure to establish proximate causation; and (3) the Statute of Limitations. All of these questions have been discussed in this brief. Furthermore, these are the same questions argued upon defendant's motion for a directed verdict, in connection with which the trial judge was minded to direct a verdict for the defendant, and he stated that plaintiff had failed to establish a case in these respects (R. 718-725).

Petitioner's brief (p. 22) states that "the soda ash dust gave the plaintiff the itch, developing into a skin rash and into a carbuncle. It also affected the skin under his arms." We challenge the conclusion suggested by that statement, and say that the proofs are very definitely to the contrary; and that such skin difficulties which Maty experienced were entirely non-occupational in nature and due entirely to a ringworm infection. No physician was produced by plaintiff to testify with respect to treating him for his skin condition or for any other condition. Dr. Oleynick, the skin specialist testified that Maty's exposed parts were entirely free from irritation, and that he made patch tests with the products with which Maty worked and they proved to be negative. His diagnosis was definitely that of a ringworm infection which was non-occupational in nature (R. 465-475). Dr. Tarrant, the plant physician, testified that Maty had a fungus infection involving the axillas under the arm pits and in the groin which was not industrial in nature (R. 422 and 425). The Labor Department of the State of New Jersey held that his itch was non-occupational (R. 683). As regards the carbuncle, plaintiff's attorney on several occasions sought to suggest by questions containing an assumption of facts which were not proved or even attempted to be proved that the carbuncle was due to a dust irritation, whereupon the trial judge called a halt to this line of improper questioning. Thereupon plaintiff's counsel stated—"All right, I withdraw that, your Honor" (R. 469).

Petitioner's brief states that Felix Smietana suffered a skin rash while he worked in the Phosphate Department. He had worked with trisodium phosphate, and not soda ash or phosphate of soda (R. 707). Maty had never handled that product.

Petitioner's brief (p. 28) states that Dr. Pollak in referring to the Colgate factory stated that masks are used. Dr. Pollak's testimony in this respect appears on page 514 of the record, and upon reading his testimony it will at once appear that an entirely different product is handled at the Colgate plant and that the circumstances are entirely different. He testified that he did not know whether soda ash is used by Colgates, but that they used a powdered soap which affected him. What this substance contained the proofs do not show. In referring to the requirements of the Labor Commission that masks be used, he was referring to factories manufacturing soaps, such as Colgate's factory. He used the words "factories of the industry." The New Jersey Labor Department found no violations in defendant's departments (R. 389 and 390).

Dr. Chaffe did not testify that respirators were given to men while working in the store room where long banks of soda ash are stored in order to prevent "irritation" of their nasal passages (petitioner's brief, p. 28). He used the expression "filling" up their nasal passages. This practice is followed to prevent suffocation and not irritation (R. 317).

Annexed to petitioner's brief is an appendix containing certain testimony which petitioner states relates to conditions in the Phosphate Department (p. 43). We shall not go into a detailed discussion of the testimony therein contained because it has all been covered in the review of all the testimony which appears in this brief. An analysis of the testimony set out in the appendix will establish that

Maty did such work in the Phosphate Department as could not have subjected him to soda ash or any other dusts. He worked outdoors three or four days every week and when he worked indoors it was with liquids or wet substances. We have also shown that the witnesses Chuba and Andricik offered no testimony which had any value for the purposes of this case.

The defendant conceded that no respirators were furnished in the Silicate Department and that there were in that department no exhaust fans. This concession was limited to the Silicate Department (R. 192 and 193). As to the Phosphate Department, defendant conceded only that no respirators were furnished in such parts of that Phosphate Department where Maty worked, although respirators were furnished in other sections of the Phosphate Department including the bins, and on special jobs in other departments of the plan. No concessions were made or asked with respect to exhaust fans in the Phosphate Department (R. 199 and 200).

Petitioner cites cases on the question of knowledge which we shall discuss briefly, and show that they are not in point. In the main they refer to admittedly dangerous or explosive chemicals, or deal with cases involving accidents (Petitioner's Brief, pp. 30-32). The products with which we are concerned in this case are by uniform experience in the business and among chemists and physicians established as entirely harmless.

The case of *Smith* v. *Oxford Iron Company* involves a new compound made with giant powder, a highly dangerous explosive. *Hysell* v. *Swift & Co.* involved work, the dangerous character of which was admittedly known to the foreman in charge,—a point to which the court refers. *Adams* v. *Refrigerator Co.* dealt with a natural law known to cause explosions, and with which the defendant in that case was chargable with knowledge. *Thompson* v. *United*

Laboratories related to arsenic, a recognized poison. *Fritz* v. *Elk Tanning Co.* involves a case under a Pennsylvania Statute and dealt with sulphuric acid poisoning. *Jacque* v. *Locke Insulator Corporation* arose out of the disease of silicosis, a disease known to the trade over a period of years as resulting from the inhalation of silica dust. Certain New York Statutes dealing with that particular disease were involved. In *Gallagher* v. *Lehberger* a boy of the age of thirteen years was injured while handling a wire which came into contact with superheated wire which was continuously tangling. The cases of *Louisville & Nashville R. Co.* v. *Wright* and *Collins* v. *Pecos & N. T. R. Co.* were decided in 1919 and involved internal injuries from creosote poisoning after railroads had been over a period of years experiencing all manner of serious injuries sustained by employees in the handling of creosote, and after many of such cases had appeared in the reported decisions of the courts of various States. It was on this ground alone that the Missouri Supreme Court in the case of *Sweany* v. *Wabash Ry. Co., supra,* decided in 1935 permitted the case to go to the jury on the question of knowledge. The cases of *Hammil* v. *Penn. R. R. Co.* and *Newark R. R. Co.* v. *McCann* involve personal injuries to persons other than employees and hold only that upon the facts therein presented, a jury question was raised.

Conclusion.

It is respectfully submitted that applying the principles of law enunciated in the foregoing cases, the judgment entered in behalf of the respondent should be affirmed.

Respectfully submitted,

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CARL E. GREUTHER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 378.—October Term, 1937.

Susie Maty, Administratrix of the Estate of George Maty, also known as George Matey, Petitioner,
vs.
Grasselli Chemical Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 14, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner (plaintiff) filed a complaint alleging that he was injured while employed in the silicate department of respondent's (defendant's) chemical plant. Later, and more than two years after the date of his injuries, he amended his complaint. The only effect of the amendment was to broaden the description of the place of employment where the injuries were sustained so as to include the phosphate department located in the same plant but in a different building 500 feet removed from the silicate department.

The sole question is: Did the New Jersey statute of limitations of two years bar the amendment because it set out a new cause of action?

The cause, originally brought in the New Jersey State Court, was removed, because of diversity of citizenship, to the District Court of New Jersey, where a verdict for plaintiff was set aside and judgment entered for defendant. The Court of Appeals affirmed, holding that the amendment to the complaint set out a new cause of action and was barred by the New Jersey statute of limitations.[1]

The pertinent part of the New Jersey statute of limitations reads:[2]

" . . . all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any . . . corporation or corporations within this State, *shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after.*"

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[1] 89 Fed. (2d) 456; certiorari granted, — U. S. —. While the cause was pending in the Court of Appeals, the plaintiff died and his wife, the present plaintiff, was substituted as Administratrix. Both are referred to as petitioner (plaintiff).

[2] 3 N. J. Comp. St. 1910, p. 3164, Section 3; P. L. 1896, p. 119.

The original complaint alleged:

"1. The plaintiff was in the employ of the defendant in the month of *November, 1933, and for some time prior thereto* at defendant's plant in Grasselli, County of Union and State of New Jersey.

"2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate Department of defendant's plant."

The complaint further alleged that plaintiff was injured while so employed by inhaling gases or injurious substances proximately caused by respondent's failure to protect plaintiff from unnecessary dangers and to provide plaintiff a reasonably safe place in which to work.

The amendment—added more than two years after the injuries were sustained—caused Paragraph 2 of the complaint to read as follows:

"2. The plaintiff was employed by the defendant as furnace man, operator and general worker in the Silicate Department of defendant's plant *and was also employed in other Departments of the defendant's plant where he performed his duties as he was directed to do during his employment in the Phosphate Department and Dorr department.*" (New matter represented by italics.)

This amendment did not change plaintiff's cause of action. The original action was brought for injuries sustained by inhaling harmful substances while the plaintiff was in the defendant's employ previous to and including November 1933. The essentials of this cause of action were employment; injury by or from harmful gases or substances while engaged in the employment; and proof that the injuries resulted from the negligent failure of defendant to protect plaintiff from unnecessary dangers and to provide plaintiff with a reasonably safe place in which to work. The responsibility of respondent was the same whether the harmful gases or substances were inhaled in the silicate department, the phosphate department, the dorr department or any other department where plaintiff was performing his duties under his employment. It is not reasonably possible to say that petitioner's right of recovery under the original complaint and under the amended complaint were two separate and distinct causes of action. Petitioner can have only one recovery for the one single injury alleged as a result of a breach of one continuing duty under one continuous employment.

The New Jersey Court of Errors and Appeals very clearly declared that State's rule applying to the operation of its statute of limitations, in 1935, as follows:

". . . amendments in causes where the statute of limitations has run, . . . will not, as a rule, be held to state a new cause of action *if the facts alleged show, substantially, the same wrong with respect to the same transaction*, or, *if it is the same matter more fully and differently laid*, or, *if the gist of the action, or the subject of the controversy remains the same;* and this is true although . . . the alleged incidents of the transaction may be different. *Technical rules will not be applied in determining whether the cause of action stated in the original and amended pleadings are identical,* since, in the strict sense, almost any amendment may be said to change the original cause of action."[3]

Under this rule laid down by the New Jersey Court, as to New Jersey's statute of limitations, the amended complaint here substantially alleged the same wrong as the original complaint; relied upon the identical matter *more fully and differently laid;* and the essential elements of the action and the controversy remained the same between the parties after as before the amendment.

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same general place of employment, the same injury and the same negligence. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant. The New Jersey statute of limitations did not bar the amended cause of action. The court below was in error. Since the judgment of the Court of Appeals was based only on a consideration and improper application of the statute of limitations, the cause is reversed and remanded to the Court of Appeals for further proceedings in harmony with these views.

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[3] Magliaro *v.* Modern Homes, Inc., 115 N. J. L. 151, 157; O'Shaughnessy *v.* Bayonne News Co., 9 N. J. Misc. 345, 347; and see, New York Central Railroad Co. *v.* Kinney, 260 U. S. 340; and United States *v.* Memphis Cotton Oil Co., 288 U. S. 62.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.